

STATEMENT OF RECORD.

SUPERIOR COURT OF THE UNITED STATES,

NEW YORK, NOVEMBER 1823.

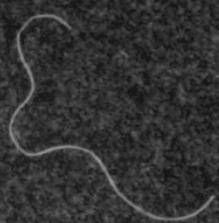
No. 10419

DIRECTOR GENERAL OF RAILROADS, PETITIONER,

SAMUEL CASTROBONAL,

**ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE
OF NEW YORK.**

(2187)



(28,897)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 374.

DIRECTOR GENERAL OF RAILROADS, PETITIONER,

v/s.

SAMUEL KASTENBAUM.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF NEW YORK.

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Original.

Certified Copy.

STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

SAMUEL KASTENBAUM, Plaintiff-Respondent,

against

DIRECTOR GENERAL OF RAILROADS, Defendant-Appellant.

RECORD ON APPEAL.

Holender & Holender,

Attorneys for Plaintiff-Respondent,
734-738 Prudential Building,
Buffalo, N. Y.

Kenefick, Cooke, Mitchell & Bass,

Attorneys for Defendant-Appellant,
1330 Marine Trust Building,
237 Main Street,
Buffalo, N. Y.

Statement under Rule 41.

This action was instituted by the service of a summons on the 17th day of August, 1918. Issue was joined by the service of defendant's answer on the 21st day of May, 1920.

The attorneys for the plaintiff are Holender & Holender and the attorneys for the defendants are Kenefick, Cooke, Mitchell & Bass.

No change in parties or attorneys has taken place since the commencement of this action.

Dated, March 2nd, 1921.

KENEFICK, COOKE, MITCHELL &
BASS,
Attorneys for Defendant-Appellant.

1 Notice of Appeal from Judgment.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,

against

DIRECTOR GENERAL OF RAILROADS, Defendant.

SIRS:

Please take notice that the defendant, Director General of Railroads hereby appeals to the Appellate Division of the Supreme Court

in and for the Fourth Judicial Department from the judgment in favor of the plaintiff and against the said defendant in the sum of Six hundred five dollars and seventy-five cents (\$605.75) damages and costs entered in the office of the Clerk of the County of Erie on the 16th day of October, 1920, and said defendant hereby appeals from each and every part of said judgment.

2 Dated: Buffalo, N. Y., November 11th, 1920.

Yours, etc.,

KENEFICK, COOKE, MITCHELL &
BASS,
Attorneys for Defendant-Appellant.

Office & P. O. Address, Marine Trust Building, 237 Main Street, Buffalo, N. Y.

To Holender & Holender, Esqs., Attorneys for Plaintiff, and to the Clerk of Erie County.

3 *Notice of Appeal from Order.*

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,
against

LEHIGH VALLEY RAILROAD COMPANY, Defendant.

Please take notice, that the above named defendant hereby appeals to the Appellate Division, Fourth Department, from an order made in the above entitled action denying the defendant's motion for a new trial upon all the grounds specified in Section 999 of Code of Civil Procedure, except that the verdict was inadequate, said order having been entered in Erie County Clerk's office on the 16th day of October, 1920, and a copy thereof, with notice of entry, having been served upon the attorneys for the defendant on the 4th day of December, 1920.

4 Dated Buffalo, N. Y. December 7th, 1920.

Yours, etc.,

KENEFICK, COOKE, MITCHELL &
BASS,
Attorneys for Defendant.

Office and Post Office Address, 1330 Marine Trust Building, Buffalo, New York.

To Messrs. Holender & Holender, Attorneys for the plaintiff, and to Clerk of the County of Erie.

10

Summons

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,
against

LEHIGH VALLEY RAILROAD COMPANY, Defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the date of service; and, in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Erie.

Dated, this 17th day of July, 1918.

HOLENDER & HOLENDER,
Attorneys for Plaintiff.

Office & Post Office Address, 734-738 Prudential Bldg., Buffalo,
N. Y.

6 Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,

against

LEHIGH VALLEY RAILROAD COMPANY, Defendant.

The plaintiff, above-named, by Holender & Holender, his attorneys, for his cause of action against the above-named defendant, alleges:

I. That the plaintiff now is, and at all of the times hereinafter mentioned was, a resident of the City of Buffalo, Erie County, State of New York.

II. That the defendant, Lehigh Valley Railroad Company, now is, and at all the times hereinafter mentioned was a foreign corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and, at all the times hereinafter mentioned, was, and now is, doing business in the City of Buffalo, Erie County, State of New York, and elsewhere.

III. That on January 24, 1918, the above named defendant, through Robert O. Whitton, its agent, servant or employee, acting under its employment and within the scope of its authority, appeared

before one of the clerks of the City Court of Buffalo, and then
7 and there made complaint in writing against the plaintiff
herein and one Jno. Doe, whereby the said defendant charged
this plaintiff and said Jno. Doe with having committed the crimes
of Grand Larceny, 1st degree, and Burglary, 3rd degree, as more
fully appears by the information laid before the said court of which
the following is a true copy:

"Information for Grand Larceny, 1st Deg., and Burglary, 3rd Degree."

STATE OF NEW YORK,
Erie County,
City of Buffalo, ss:

Robert O. Whitton, being duly sworn deposes and says, that he resides in the City of Buffalo, N. Y., at No. 35 Trowbridge street; that on the 20th day of December, 1917, at the said City of Buffalo aforesaid, divers goods, chattels, money and property of Lehigh Valley Ry. Co. of the kind, description and value as follows, to wit: Quantity of butter, valued at \$1,000.00, by breaking open a car of the Lehigh Valley Ry. Co., were unlawfully and wilfully stolen, taken and carried away * * * by one Samuel Kastenbaum and one Jno. Doe (name unknown) with intent to deprive deponent of said goods, chattels, money and property, and the use and benefit thereof, and appropriate same to their own use, and wherefore said
8 complainant prays that proper warrant may issue according to law touching the premises.

R. O. WHITTON.

Taken, subscribed and sworn to before me this 24 day of Jan., 1918.

FRANK J. HAAS,
Clerk of the City Court of Buffalo."

IV. That by virtue of said process and on or about said 24th day of January, 1918, defendant herein, through its agent, servant or Special Officer, James Magwood, acting under its employment and within the scope of its authority, accompanied by various police officers of the City of Buffalo, arrested plaintiff, and restrained and deprived him of his liberty.

V. That the aforesaid process so as aforesaid issued by the defendant against plaintiff, and his arrest thereunder, was false, wanton, malicious and without probable cause, and charged plaintiff with the crimes of Grand Larceny, 1st degree, and Burglary, 3rd degree.

VI. That plaintiff's arrest, as aforesaid, by reason of the aforesaid process obtained and issued falsely, wantonly, maliciously and without probable cause against plaintiff by defendant, took place at midnight, at which time plaintiff was suddenly and forcibly and against

his will taken from the privacy of his home, in the City of Buffalo, separated from his young wife, who was then ill and in a delicate condition conveyed as a criminal through the public streets and places in said City of Buffalo in the custody and care of the agents and servants of the defendant, and police officers of the said City of Buffalo, and lodged in Police Headquarters in said City.

That at said Police Headquarters plaintiff was compelled to submit to being photographed for the rogues' gallery, and was subjected to severe and humiliating questioning and false accusations.

That he was restrained and deprived of his liberty and imprisoned in a cell from midnight until about noon of the following day.

That thereafter plaintiff herein was arraigned before Hon. Albert A. Hartzell, Justice of the City Court of Buffalo, and demanded an immediate hearing, but defendant requested an adjournment for the purpose of producing witnesses, and said hearing was thereupon adjourned until January 31, 1918.

That plaintiff was then and there held by the Justice of said court in the sum of two thousand dollars bail.

That on said 31st day of January, 1918, plaintiff and his attorney again appeared in said City Court and demanded a hearing, but, at the instance of the defendant, a further adjournment was granted until February 8, 1918.

10 That on said 8th day of February, 1918, plaintiff and his attorney again appeared in said City Court for a hearing and defendant swore twelve alleged witnesses against plaintiff charging him with the commission of the crimes of Grand Larceny, 1st degree, and Burglary, 3rd degree; and, thereafter, adjourned said hearing until Feb. 13, 1918, owing to the absence of some witnesses.

That on said 13th day of February, 1918, plaintiff and his attorney again appeared in said court, but at the instance of the said court, the further hearing was postponed until Feb. 20, 1918.

That on said 20th day of February, 1918, plaintiff and his attorney again appeared in said court for said hearing, but, on account of the illness of counsel for the defendant, same was again postponed until February 27, 1918.

That on said 27th day of February, 1918, plaintiff and his attorney again appeared in said court for said hearing and defendant swore two additional witnesses, charging plaintiff with the alleged commission of the crimes of Grand Larceny and Burglary.

VII. That the defendant herein, complainant in the aforesaid proceedings, before said court, having been afforded an opportunity to present evidence to sustain said charges, wholly and completely failed to do so or to offer or tender any evidence tending to show probable cause therefor, and thereupon the plaintiff herein, defendant 11 in such proceedings, was acquitted and discharged and said charges so falsely, wantonly, maliciously and without probable cause made against him, were dismissed without the plaintiff herein, defendant in said proceedings, having been put to his defense and without his having offered proof of any kind, but solely upon the

failure of the complainant in said proceedings, defendant herein, to show even a *prima facie* case or probable cause for said charges.

VIII. That prior to his arrest by the defendant upon said charges so falsely, wantonly, maliciously and without probable cause made against him this plaintiff did assure defendant, its agents or servants, of the falsity and lack of foundation for said charges and did explain and represent to them that said charges were false and unfounded and requested them to investigate same further, and informed them that they were acting upon misinformation and without probable cause; and further represented to them that to take him away from his wife would result in great hardship owing to her condition at that time.

IX. That throughout all of said time and from the time of this plaintiff's arrest, to-wit, January 24, 1918, until he was discharged and acquitted on February 27, 1918, this plaintiff was humiliated, cruelly and inhumanely treated, was imprisoned held to bail and refused the right to the ordinary decencies of life.

12 X. That defendant, through its agents and servants, also refused the plaintiff's demand for an opportunity to communicate with his attorney, though plaintiff herein did constantly protest against such unlawful, cruel and inhuman treatment, and did constantly represent his entire innocence of the charges made against him.

XI. That the plaintiff is a married man and the father of an infant child, and has always borne a clear and untainted reputation, has never been accused of crime other than as falsely, wantonly, maliciously and without probable cause accused by this defendant.

XII. That by reason of the premises plaintiff has been seriously damaged in his reputation; has been humiliated and degraded and caused to suffer excruciating mental agony and serious physical pain and suffering; has had his nervous system shocked and to some extent permanently impaired; has been deprived for a considerable length of time of the opportunity to earn a living; that his earning capacity in the business in which he was engaged at the time of said false, malicious and unwarranted arrest, has been materially impaired; that he has been obliged to expend moneys for attorneys' fees and other needful expenses, all to his damage in the sum of Twenty-five thousand dollars.

13 Wherefore, plaintiff demands judgment against the defendant for the sum of Twenty-five thousand dollars, together with the costs and disbursements of this action.

HOLENDER & HOLENDER,
Attorneys for Plaintiff.

Prudential Building, Buffalo, N. Y.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Samuel Kastenbaum, being duly sworn, deposes and says that he is the plaintiff, has heard read the foregoing complaint in this action, that he knows the contents thereof; and that the same is true to his own knowledge, except as to matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SAMUEL KASTENBAUM.

Sworn to before me this 12th day of August, 1918.

I. G. HOLENDER,
Notary Public.

14

Answer.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,
against

LEHIGH VALLEY RAILROAD COMPANY, Defendant.

The defendant above named by its attorneys Kenefick, Cooke, Mitchell & Bass, answering the plaintiff's complaint herein,

First.

I. Admits the allegations contained in paragraphs "I" and "II" of plaintiff's complaint.

II. Denies that it has any knowledge or information as to each and every other allegation in said complaint contained sufficient to form a belief.

Second.

For a second, separate and further answer and defense to plaintiff's complaint and to the alleged cause of action therein contained, the defendant alleges upon information and belief,

III. That heretofore and on or before the 1st day of January 1918, the President of the United States of America, as such, took possession, of and assumed control of the entire system of
15 transportation of the defendant and appointed William G.

McAdoo Director General of Railroads, and that the said Director General and his successor as such has since the 1st day of January 1918 had and at the times referred to in plaintiff's complaint had the possession, control and operation of the railroad of this defendant.

Third.

For a third, separate and further answer and defense to plaintiff's complaint and to the alleged cause of action therein contained, the defendant alleges upon information and belief,

IV. That heretofore and on or before the 1st day of January, 1918, the President of the United States of America as such, took possession of and assumed control of the entire system of transportation of the defendant and appointed William G. McAdoo Director General of Railroads, and that the said Director General of Railroads and his successors as such, had since the 1st day of January, 1918, and at the times referred to in plaintiff's complaint, had the possession, control and operation of the railroad of this defendant; that the possession, control and operation of the railroad of this defendant taken as aforesaid by the President of the United States of America and assumed by the Director General of Railroads as aforesaid, was

so taken, possessed, controlled, and operated and continued to

16 be so possessed, controlled and operated by virtue of and pursuant to a proclamation of the President of the United States issued under date of December 26, 1917, and by proclamation issued under date of April 11, 1918, and an Act of Congress called the Federal Control Act approved March 21, 1918, and that said possession, control and operation of said railroad by the Director General of Railroads was directed in part by general orders issued from time to time by the said Director General of Railroads pursuant to and by virtue of the said proclamations of the President of the United States, which said proclamations provide, among other things, that any orders, general or special, thereafter made by said Director General shall have paramount authority and shall be obeyed as such.

That heretofore the said Director General of Railroads issued a general order known as Order No. 50, which was dated October 28, 1918, and which provided, among other things, that actions at law arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads should be brought against William G. McAdoo, Director General of Railroads, and not otherwise; and further providing that pleadings in all actions of law pending at the time said order was issued against any carrier com-

pany for a cause of action arising since December 31, 1917,

17 based on a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the said Director General of Railroads for the carrier company as party defendant, and dismissing the company therefrom, to all the provisions of which said order No. 50 reference hereby is made as though set forth in full.

That thereafter said order No. 50 was amended by general order No. 50—A, which said order contained the same provisions as order No. 50 hereinabove referred to, but directed that thereafter actions of the character hereinabove referred to should be brought against "Director General of Railroads" and not otherwise, reference to said

order No. 50—A being hereby made as though herein set forth in full.

Wherefore, defendant demands judgment dismissing the plaintiff's complaint, together with the costs of this action.

KENEFICK, COOKE, MITCHELL &
BASS,

Attorneys for Defendant.

Office & P. O. Address, Marine Trust Bldg., 237 Main St., Buffalo,
N. Y.

STATE OF NEW YORK,
County of New York, ss:

H. R. German, being duly sworn deposes and says: that he is an
officer, to wit, Assistant Secretary of the Lehigh Valley Rail-
road Company, the defendant in the above entitled action;
that he has read the foregoing answer and knows the contents
thereof; that the same is true to the knowledge of deponent except as
to the matters therein stated to be alleged upon information and be-
lief, and as to those matters he believes it to be true.

H. R. GERMAN.

Sworn to before me this 19th day of April, 1920.

STANLEY R. MALLORY,
Notary Public in and for New York Co., N. Y.

Notary Public Kings Co. No. 142.
Certificate Filed in N. Y. Co. No. 852.
N. Y. Co. Register's No. 2304.
Kings Co. Register's No. 2159.
N. Y. Commission expires March 30, 1922.

19

Amended Complaint.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,
against

DIRECTOR GENERAL OF RAILROADS, Defendant.

Amended Complaint.

The plaintiff, above-named, by Holender & Holender, his attor-
neys, for his cause of action against the above-named defendant, al-
leges:

1. That the plaintiff now is, and at all of the times hereinafter mentioned was, a resident of the City of Buffalo, Erie County, State of New York.

2. That the Lehigh Valley Railroad Company, now is and at all times hereinafter mentioned was, a foreign corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and, at all the times hereinafter mentioned, was, and now is, doing business in the City of Buffalo, Erie County, State of New York, and elsewhere.

3. Upon information and belief that by virtue of an Act of Congress, approved March 21, 1918, and entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners and for other purposes," it was provided, among other things that carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers whether arising under State or Federal law or common law, except in so far as it may be inconsistent with the provisions of this Act, or any other act applicable to such Federal control, or with an order of the President of the United States; that since that time various orders have been issued providing for the substitution of the Director General of the Railroads in the place of the Railroad Companies in certain cases, and that, upon information and belief, the Lehigh Valley Railroad Company was, at all times herein-after mentioned, controlled and operated by the above Director General of Railroads.

4. That on January 24, 1918, the above named defendant, through Robert O. Whitton, his agent, servant or employee, acting under his employment and within the scope of his authority, appeared before one of the clerks of the City Court of Buffalo, and then and there made complaint in writing against the plaintiff herein and one Jno. Doe, whereby the said defendant charged this plaintiff and said Jno. Doe with having committed the crimes of Grand Larceny, 1st degree, and Burglary, 3rd degree, as more fully appears by the information laid before the court of which the following is a true copy:

21 "*Information for Grand Larceny, 1st Deg., and Burglary, 3rd Degree.*

STATE OF NEW YORK,
Erie County,
City of Buffalo, ss:

Robert O. Whitton, being duly sworn deposes and says, that he resides in the City of Buffalo, N. Y., at No. 35 Trowbridge Street; that on the 20th day of December, 1917, at the said City of Buffalo aforesaid, divers goods, chattels, money and property of Lehigh Valley Ry. Co. of the kind, description and value as follows, to wit: Quantity of butter, valued at \$1,000.00, by breaking open a car of the Lehigh Valley Ry. Co., were unlawfully and wilfully stolen, taken and carried away * * * by one Samuel Kastenbaum and one Jno. Doe (name unknown) with intent to deprive deponent of said goods, chattels, money and property, and the use and benefit thereof, and appropriate same to their own use, and wherefore said com-

plainant prays that proper warrant may issue according to law touching the premises.

R. O. WHITTON.

Taken, subscribed and sworn to before me this 24 day of Jan. 1918.

FRANK J. HAAS,
Clerk of the City Court of Buffalo."

22 5. That by virtue of said process and on or about said 24th day of January, 1918, defendant herein, through his agent, servant or Special Officer, James Magwood, acting under his employment and within the scope of his authority, accompanied by various police officers of the City of Buffalo, arrested plaintiff, and restrained and deprived him of his liberty.

6. That the aforesaid process so as aforesaid issued by the defendant against plaintiff, and his arrest thereunder, was false, wanton, malicious and without probable cause, and charged plaintiff with the crimes of Grand Larceny, 1st degree, and Burglary, 3rd degree.

7. That plaintiff's arrest, as aforesaid, by reason of the aforesaid process obtained and issued falsely, wantonly maliciously and without probable cause against plaintiff by defendant, took place about midnight, at which time plaintiff was suddenly and forcibly and against his will taken from the privacy of his home, in the City of Buffalo, separated from his young wife, who was then ill and in a delicate condition, and conveyed as a criminal through the public streets and places in said City of Buffalo in the custody and care of the agents and servants of the defendant, and police officers of the said City of Buffalo, and lodged in Police Headquarters in said City.

23 8. That at said Police Headquarters plaintiff was compelled to submit to being photographed for the rogues' gallery, and was subjected to — liberty and imprisoned in a cell until noon of the — accusations.

9. That he was restrained and deprived of his liberty and imprisoned in a cell until noon of the following day.

10. That thereafter plaintiff herein was arraigned before Hon. Albert A. Hartzell, Justice of the City Court of Buffalo, and demanded an immediate hearing, but defendant requested an adjournment for the purpose of producing witnesses, and said hearing was thereupon adjourned until January 31, 1918.

11. That plaintiff was then and there held by the Justice of said court in the sum of two thousand dollars' bail.

12. That on said 31st day of January, 1918, plaintiff and his attorney again appeared in said City Court and demanded a hearing, but, at the instance of the defendant, a further adjournment was granted until February 8, 1918.

13. That on said 8th day of February, 1918, plaintiff and his attorney again appeared in said City Court for a hearing and defendant swore twelve alleged witnesses against plaintiff charging him with the commission of the crimes of Grand Larceny 1st degree, and Burglary, 3rd degree and, thereafter, adjourned said hearing
24 until Feb. 13, 1918, owing to the absence of some witnesses.

14. That on said 13th day of February, 1918, plaintiff and his attorney again appeared in said court, but, at the instance of the said court, the further hearing was postponed until Feb. 20, 1918.

15. That on said 20th day of February, 1918, plaintiff and his attorney again appeared in said court for said hearing, but, on account of the illness of counsel for the defendant, complainant in said proceeding, same was again postponed until February 27, 1918.

16. That on said 27th day of February, 1918, plaintiff and his attorney again appeared in said court for said hearing and defendant swore two additional witnesses, charging plaintiff with the alleged commission of the crimes of Grand Larceny and Burglary.

17. That the defendant herein, complainant in the aforesaid proceedings, before said court, having been afforded an opportunity to present evidence to sustain said charges, wholly and completely failed to do so to offer or tender any evidence tending to show probable cause therefor, and thereupon the plaintiff herein, defendant in such proceedings, was acquitted and discharged and said charges so falsely, wantonly, maliciously and without probable cause made against him, were dismissed without the plaintiff herein,
25 defendant in said proceedings, having been put to his defense and without his having offered proof of any kind, but solely upon the failure of the complainant in said proceedings, defendant herein, to show even a prima facie case or probable cause for said charges.

18. That prior to his arrest by the defendant upon said charges so falsely, wantonly, maliciously and without probable cause made against him this plaintiff did assure defendant, its agents or servants, of the falsity and lack of foundation for said charges and did explain and represent to them that said charges were false and unfounded and requested them to investigate same further, and informed them that they were acting upon misinformation and without probable cause; and further represented to them that to take him away from his wife would result in great hardship owing to her condition at that time.

19. That throughout all of said time and from the time of this plaintiff's arrest, to-wit, January 24, 1918, until he was discharged and acquitted on February 27, 1918, this plaintiff was humiliated, cruelly and inhumanely treated, was imprisoned, held to bail and refused the right to the ordinary decencies of life.

20. That defendant, through his agents and servants, also refused the plaintiff's demand for an opportunity to communicate

26 with his attorney, though plaintiff herein did constantly protest against such unlawful, cruel and inhuman treatment, and did constantly represent his entire innocence of the charges made against him.

21. That the plaintiff is a married man and the father of an infant child, and has always borne a clear and untainted reputation, has never been accused of crime other than as falsely, wantonly, maliciously and without probable cause accused by this defendant.

22. That by reason of the premises plaintiff has been seriously damaged in his reputation; has been humiliated and degraded and caused to suffer excruciating mental agony and serious physical pain and suffering; has had his nervous system shocked and to some extent permanently impaired; has been deprived for a considerable length of time of the opportunity to earn a living; that his earning capacity in the business in which he was engaged at the time of said false, malicious and unwarranted arrest, has been materially impaired; that he has been obliged to expend moneys for attorneys' fees and other needful expenses, all to his damage in the sum of Twenty-five thousand dollars.

27 Wherefore, plaintiff demands judgment against the defendant for the sum of Twenty-five thousand dollars, together with the costs and disbursements of this action.

HOLENDER & HOLENDER,
Attorneys for Plaintiff.

Prudential Building, Buffalo, N. Y.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Samuel Kastenbaum, being duly sworn, deposes and says that he is the plaintiff in this action, that he has heard read the foregoing complaint and knows the contents thereof; and that the same is true to his own knowledge, except as to matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SAMUEL KASTENBAUM,

Sworn to before me this 3rd day of May, 1920.

I. G. HOLENDER,
Notary Public, Erie Co. N. Y.

Answer to Amended Complaint.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,

against

DIRECTOR GENERAL OF RAILROADS, Defendant.

The defendant above named, by his attorneys, Kenefick, Cooke, Mitchell, & Bass, answering the plaintiff's complaint herein--

1. Admits the allegations contained in paragraphs 1 and 3 of plaintiff's complaint.

2. Admits that the Lehigh Valley Railroad Company now is, and was at all the times mentioned in the complaint, a foreign corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania. Admits that said Lehigh Valley Railroad Company now is doing business in the City of Buffalo, Erie County, State of New York and elsewhere. Denies each and every other allegation in said paragraph 2 contained.

3. Denies upon information and belief each and every allegation contained in paragraphs numbered 6, 7, 17, 18, 19, 20 and 22 of the plaintiff's complaint.

29 4. Denies that he has any knowledge or information thereof sufficient to form a belief as to each and every other allegation in said complaint contained not hereinbefore specifically admitted or denied.

Wherefore, defendant demands judgment dismissing the complaint herein, with costs.

KENEFICK, COOKE, MITCHELL, &
BASS,*Attorneys for Defendant.*

Office & P. O. Address, Marine Trust Bldg., 237 Main St., Buffalo,
N. Y.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

James McC. Mitchell, being duly sworn, deposes and says that he is a member of the firm of Kenefick, Cooke, Mitchell & Bass, the attorneys for the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

That the reason this affidavit is made by deponent and not by the defendant is that the defendant is not a resident of the State 30 of New York nor of the County of Erie where defendant's attorneys reside and have their office; that the sources of deponent's information and the grounds of his belief as to the matters therein stated to be alleged upon information and belief are reports and investigations made by the police department of the Lehigh Valley Railroad Company and submitted to deponent.

JAMES McC. MITCHELL.

Subscribed and sworn to before me this 21 day of May, 1920.

THOMAS R. WHEELER,
Notary Public in and for Erie Co., N. Y.

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Stipulation of Facts.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,

against

DIRECTOR GENERAL OF RAILROADS, Defendant.

It is hereby stipulated by and between the attorneys for the respective parties hereto—

1. That shipments of butter were made from Albert Lee and Meadford, Minn. to American Stores Company, Philadelphia, Pa., over various railroads and over the Lehigh Valley Railroad from Suspension Bridge, N. Y., to Philadelphia, Pa.; that said shipments were contained in car N. Y. D. 930 on December 20th, 1917; that upon arrival at Philadelphia said shipments were found short by twenty (20) tubs and that the value of the shortage amounted to a sum in excess of Five Hundred Dollars (\$500). 2. That the said tubs which were missing from the said shipments were the same tubs contained in the wagon struck by the trolley car of the International Railway Company on December 21st, 1917, and were later taken to No. 6 police station.

32 Dated, Buffalo, N. Y., May 20th, 1920.

HOLENDER & HOLENDER,
Attorney- for Plaintiff.
KENEFICK, COOKE, MITCHELL &
BASS,
Attorneys for Defendant.

Clerk's Minutes.

At a Trial Term of Supreme Court Held at the City and County Hall, in the City of Buffalo, in and for the County of Erie, on the 11th Day of Oct., 1920.

Present:

Hon. Alonzo G. Hinkley, Justice Presiding.
Holender & Holender (per Israel Holender).
Kenefick, Cooke, Mitchell & Bass (per T. R. Wheeler).

SAMUEL KASTENBAUM, Plaintiff,

against

DIRECTOR GENERAL OF RAILROADS, Defendant.

Jury.

1. William Dahl.
2. Julius A. Metz.
3. Edward A. Eisele.
4. John W. Winter.
5. Henry Buckelmuller.
6. Martin J. Hogan.
7. George N. Springweiler.
8. Edward Jauch.
9. Henry H. Perrine.
- 34 10. Joseph Theisen.
11. Hartley A. Hardman.
12. William Wahl.

Defendant moves to dismiss the complaint as to the charge of malicious prosecution. Denied.

Counsel open the case.

Witnesses for Plaintiff.

Edward F. Walsh.
Samuel Kastenbaum (Plaintiff).

Plaintiff rests.

Defendant moves to dismiss the complaint. Granted as to the charge of malicious prosecution, denied as to the charge of false arrest.

Witnesses for Defense.

Herbert Zenfels.
Earl M. Alsworth.
Austin J. Roach.
Thomas H. Flesh.
Harold Sturdevant.

Recess till 2 P. M. At 2 P. M. Trial proceeds.

Witnesses for Defense.

Bernard Frey.
Harry Bleich.
William Jones.
James Magwood.
Bernard Blosser (testimony read).
Robert O. Whitcom.

Defendant rests.

35 Witnesses for Plaintiff (Rebuttal).

Pearl Kastenbaum.

Harry Evans.

Evidence closed.

Defendant renews motion for a non-suit and moves to direct a verdict for Defendant. Denied.

Counsel sum up.

Court charges the Jury.

Jury retires, at 5:45 P. M. in the custody of Deputy Sheriffs, Harold E. Ruhling and Charles A. Beeman who are in charge of this jury. Court adjourns to Oct. 12, 1920, 9:45 A. M. Oct. 12, 1920, Hinkley J.

Court convenes at 9:45 A. M.

Jury returns into Court bringing a sealed verdict for the Plaintiff in the sum of \$500.00.

Defendant moves for a new trial on all grounds under Section 999 Code of Civil Procedure.

Denied.

Stay of 30 days after entry of judgment.

I hereby certify that the foregoing is a true copy of the Clerk's minutes in the above entitled action.

EDWARD J. CLARK,
Deputy County Clerk,
Erie County, N. Y.

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Judgment.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,
against

DIRECTOR GENERAL OF RAILROADS, Defendant.

The above entitled action having come on for trial in Part 4, of this Court, before Hon. Alonzo G. Hinkley, and a jury, on the 11th day of October, 1920, and said jury, having on the 12th day of October, 1920, rendered a verdict in favor of the plaintiff and against the defendant, for the sum of \$500.00, and said verdict having been

duly reported to the court and entered in the minutes of the clerk thereof, it is

Adjudged that the plaintiff recover of the defendant, the sum of \$500.00, so found by said jury, together with the sum of \$105.75, costs and disbursements, amounting in all \$605.75, and that plaintiff have execution against defendant therefor.

Judgment signed this 15th day of October, 1920.

E. J. CLARK,
Deputy Clerk.

Order Denying Motion for a New Trial.

At a Trial Term of the Supreme Court Held in and for the County of Erie, at the City and County Hall, in the City of Buffalo, N. Y., on the 12th Day of October, 1920.

Present: Hon. Alonzo G. Hinkley, Justice Presiding.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,

against

DIRECTOR GENERAL OF RAILROADS, Defendant.

This action having regularly come before me at a Trial Term of this Court on the 11th day of October, 1920, and the issues therein having been regularly submitted to a jury and the jury, having on the 12th day of October, 1920, duly returned its verdict to the court, awarding the plaintiff damages in the sum of \$500.00 against the defendant, and the defendant, by its counsel, Thomas R. Wheeler, Esq., having made a motion for a new trial on all the grounds stated

in Section 999 of the Code of Civil Procedure, except the
38 ground that the verdict is inadequate and upon the exceptions taken on the trial, and the plaintiff, by his counsel, Israel G. Holender, Esq., having opposed said motion;

Now, after due deliberation, it is ordered

First. That the motion of the defendant for a new trial be, and the same hereby is, in all things, denied.

Second. That there be a stay of execution and proceedings, on the part of the plaintiff, for 30 days after service of notice of entry of judgment on the defendant's attorneys.

Dated, Buffalo, N. Y., October, 12th 1920.

ALONZO G. HINKLEY,
J. S. C.

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Case and Exceptions.

Supreme Court, Erie County.

SAMUEL KASTENBAUM

vs.

DIRECTOR GENERAL OF RAILROADS.

The Trial of this Cause was held Monday, October 11, 1920, before the Honorable Alonzo G. Hinkley, Justice presiding, and a Jury in Part IV, Room 34, City & County Hall, in the City of Buffalo and State of New York.

In the examination of the jury Mr. Holender asked:

Mr. Holender: Have any of you gentlemen any stock in the Lehigh Valley Railroad?

Mr. Wheeler: I object to that question on the ground this action is brought against the Director General of Railroads. The Lehigh Valley Railroad is not concerned.

Mr. Holender: This action was brought, at the time of it, it was properly brought, against the Lehigh Valley Railroad, but through some later legislation it was substituted against the Director General of Railroads.

The Court: Isn't the liability, if any, against the Director General?

Mr. Holender: It was substituted according to that Order 50 but this action at the time it was brought was properly brought against the Lehigh Valley Railroad.

40 The Court: What I am getting at. Isn't the liability if any, against the Director General of Railroads? Do you claim the Lehigh Valley now assumes the liability?

Mr. Wheeler: No, it has not.

The Court: I guess we better leave out the Lehigh Valley Railroad.

The Jury was duly empanelled and accepted.

Mr. Wheeler: If your Honor please, before Mr. Holender opens the case to the jury I desire at this time to move to dismiss the plaintiff's complaint in so far as it states a cause of action for malicious prosecution against the defendant. The complaint although it does not separately state two causes of action, does state two causes of action together, one for false arrest, one for malicious prosecution. As I understand the law, a cause of action for malicious prosecution cannot be urged against an officer of the Government as the Director General was at the time. I suppose an action for false arrest would properly lie but in so far as the complaint states a cause of action for malicious prosecution I move now to dismiss it on the grounds it don't lie against this defendant, particularly on the ground no malice can be imputed to him.

The Court: What do you say Mr. Holender?

Mr. Holender: I say, your Honor, this action was instituted, I believe, before this act of March 1918 against the Lehigh Valley Railroad Company. If I am not mistaken, and these two actions are perfectly consistent. We can show this man was arrested without a warrant. That was the false arrest. The next day they laid an information against this man here. I think both matters are consistent.

The Court: In a general way what is your cause of action? I have not quite understood it.

Mr. Holender: This action is brought for malicious prosecution and false arrest. Mr. Kestenbaum was arrested at his home one day — charged him with burglary and larceny of some freight cars. A month after the alleged robbery he was taken from his home without a warrant. The next morning information was laid by the chief of the Lehigh Valley.

The Court: I will deny your motion. Mr. Wheeler, at this time, give you an exception.

Mr. Holender thereupon opened the case for the Plaintiff as follows:

Mr. Holender: If it please the Court and gentlemen of the jury, as you have heard, this action is brought for false arrest. We will show you, gentlemen, that Mr. Kestenbaum came to this country from Europe about fifteen years ago, he worked in New York at the tailoring trade for about eight years and then came to Buffalo about five years ago. He had to quit his tailoring trade because he was advised to get out and do some outside work. He came to Buffalo some five years ago or about two and a half years before he was arrested and he found outside work as a huckster. Some 42 gentleman who was in that business took him in business.

He gave up his tailoring trade and started out for about six months with some fellow who taught him this huckster business, buying up provisions and vegetables and going around selling them. About six or seven months of partnership resulted in his dissolving and from the time of his separation from his partner until the time of his arrest about two years, he had his customers and he hawked his goods and pursued his business. We will show you, gentlemen, that he is a citizen of this country, a law-abiding citizen. That after he came to Buffalo he got married. And we will show you that on the night of January 23, 1918, Mr. Magwood and some other officers came to his house and without any notice, without any knowledge on his part of anything, they told him that he was the fellow that broke into a freight car about a month before the day of the arrest, and that they found his horse and wagon on Main street. He told them that his horse and wagon was in the barn and showed them a receipt where he had bought his horse and they accused him of being a robber and a burglar and told him that the horse that they found on Main street abandoned, a white horse, was his horse. They told him they would investigate and give him a chance to show he never had a white horse, show who he was, and they would be con-

vinced they got the wrong man. Mr. Magwood told him he was the fellow and took him along, locked him up.

43 We will show you gentlemen that at the time they took him out of his home he asked permission to go over and see his wife who was a few doors up the street, some relative's, give him an opportunity to go tell her where he was. They refused to allow him to do that. They locked him up, took him over to the police station, locked him up, took his photograph for Rogues' Gallery, and finger prints. We will show you he was locked up over night and it was about seven or eight o'clock when they locked him up. They wouldn't give him a chance to telephone his wife until about midnight. He was kept locked up all night, brought to the police court about eleven o'clock the next morning. We will show you that he was released on bail of \$2,000. We will show you that the company adjourned the case from time to time to get some out of town witnesses I think it was. I think the proof will show that this case was adjourned about five or six times. On two occasions they swore witnesses, I think ten or twelve witnesses, against this man. That after they got through, why, the Judge discharged this man without even calling upon him, dismissed the charge of burglary and larceny. We will show you, gentlemen, that this young man had some expense and some loss, some loss of time and he was greatly injured in his reputation and in his standing in the community.

At that time his wife was in the family way. He told these officers about it. Now, Mr. Kestenbaum is a property owner, he has 44 got a wife and child. It was born a few months after he was arrested.

And if you find from the evidence, gentlemen, that this arrest was unwarranted we will ask you to render a verdict for such damages as you in your judgment believe that he is entitled to.

Mr. Wheeler opened the case for the defendant.

EDWARD F. WALSH, was called as a Witness in behalf of the Plaintiff and having been duly Sworn testified on Direct Examination by Mr. Holender as follows:

- Q. What is your business, Mr. Walsh?
A. Clerk of the City Court.
Q. How long have you been engaged as clerk of the City Court of Buffalo?
A. About seven years.
Q. Were you engaged in that capacity in January 1918?
A. Yes, sir.
Q. Have you a record of any process or warrant or information laid against one Sam Kestenbaum?
A. Yes, sir.
Q. Have you that with you?
A. Yes, sir.
Q. What is that charge?
A. Charge is grand larceny, first degree, burglary third degree.

- 45 Q. Who was it made out by?
A. Signed by, complaint of Robert O. Whitton.
Q. What does it charge?
A. Burglary third and grand larceny first degree.
Q. Now, on the 20th day of December 1917—
Mr. Wheeler: Why don't you offer it in evidence?
Q. That (indicating) is the warrant that was issued, the information?
The Court: He wants to take that warrant back.
Q. You can leave it here, can't you?
A. If somebody will be responsible.

The Warrant referred to was received in evidence and marked Plaintiff's Exhibit 1.

- Q. You also have a bail bond by which Mr. Kestenbaum was bailed out?
A. Yes, sir.

Mr. Holender: I will offer that in evidence.

The Bail Bond referred to was received in evidence and marked Plaintiff's Exhibit 2.

Mr. Holender: Date of the information is January 24, 1918, bail bond dated January 24, 1918.

The Court: You do not consider the information as any process, do you?

Mr. Holender: Why, I don't know. I am sure. He was arrested without a warrant. This shows it was their act.

- 46 Q. Mr. Walsh, is there any reference on that as to when that case first came up, as to the adjournments?
A. A number of adjourned days?
Q. The various adjourned days?
A. Yes, sir.

Mr. Wheeler: Just a minute, Mr. Walsh. Did you make that record?

The Witness: Yes, it is my handwriting.

Mr. Wheeler: Were you present at the time and noted—

Mr. Holender: He says it is his handwriting.

Mr. Wheeler: Well, I know, but I want to know what way he made the notation?

The Witness: I couldn't swear to the particular case but as these cases are adjourned I note it.

The Court: What from, information heard in court?

The Witness: From information heard in court.

Mr. Wheeler: And you did that in the course of your general work there?

The Witness: Yes, sir.

Mr. Wheeler: All right. I have no objection.

Q. Will you state what the record shows on there as to the various adjournments?

A. Well, adjourned to January 31st.

Q. From when?

A. From the 24th of January, 1918, and these dates will all be 1918; January 31st to February 8th, 13th, 20th, 27th of February.

47 Q. That is February now. Wait. January 24th, January 31st, February 8th.

A. 13th.

Q. February 13th, February 20th and February 27th?

A. Yes, sir.

Q. And what is your record happened on the 27th of February, 1918?

A. Discharged by Judge Hartzell.

Q. Whose writing is that word "Discharged" in?

A. Judge Hartzell.

Q. You recognize the writing?

A. Yes, sir.

Mr. Holender: You may ask.

Cross-examination.

By Mr. Wheeler:

Q. That information is or purports to be signed by Captain Whitton?

A. Yes, sir.

Q. The writing in the body of the information is not his, is it?

A. No.

Q. Do you know whose that is?

A. Well, I couldn't swear but I think it is the clerk, a clerk acting as warrant clerk at that time.

Q. Mr. Flannagan?

A. Mr. Haas was taking his place, on vacation.

Q. You are not sure or are you sure that that is not Flannagan's?

A. I am quite sure it is not Flannagan's.

48 Q. You think it is Haas's?

A. Yes, sir.

Q. Certainly not Whitton's, is it?

A. Well, it don't look like his writing.

Q. Haas is the man who signed down here before whom it was sworn?

A. Yes, the clerk of the court.

Q. You think the words "Quantity of butter valued at a thousand dollars, by breaking open car of the Lehigh Valley Railroad Company" are the same, written by the same person as "Haas," the name "Frank J. Haas"?

A. I think they were.

Q. Of course, you wouldn't swear that they were?

A. No.

Q. All you know is that Haas was acting part of the time there as assistant to Mr. Flannagan?

A. Yes. I couldn't really swear who wrote that.

Mr. Wheeler: Yes. I understand. That is all.

Redirect examination.

By Mr. Holender:

Q. It is a regular process of the City Court when anybody lays an information—

Mr. Wheeler: I object to that as leading.

The Court: I do not see the purpose of it, Mr. Holender.

Mr. Holender: Except I didn't see really the purpose of this question, so I thought I would add something.

49 The Court: If it has any value to you, but I don't see why.

Mr. Holender: That is all, Mr. Walsh.

SAMUEL KASTENBAUM, the Plaintiff, was called as a Witness in his own behalf and having been duly Sworn testified on Direct Examination by Mr. Holender as follows:

Q. Mr. Kestenbaum, how old are you?

A. Thirty-one.

Q. You are married?

A. Yes, sir.

Q. Any children?

Mr. Wheeler: I object to that on the ground it is immaterial.

Mr. Holender: I think I can show his standing, who he is. That is what is material here.

The Court: You do not object to showing he is married?

Mr. Wheeler: I do not object to that question but I object to the number of children and the condition of his family. I do not think it has any bearing here.

Mr. Holender: It has a bearing here on the question of his arrest.

Mr. Wheeler: He is the man who was arrested. I will concede that.

The Court: It does not have any effect on the number of children he has.

50 Mr. Holender: No.

The Court: Well, you have in there he is a married man. Strike out the rest.

Q. Mr. Kastenbaum, how long have you been in the United States?

A. Thirteen years.

Q. How old were you when you came to this country?

A. Eighteen.

Q. Where did you land?

A. In New York.

Q. Where?

A. New York.

Q. Can't hear you.

A. New York.

Q. And what did you do when you first came to this country?

A. I came to my cousin.

Q. What did you work at, anything? Start working at anything?

A. The first couple of weeks he gave me a rest, then I started to learn a trade in a shop.

Q. What did you start to learn, what trade?

The Court: Suppose you lead him up to the time of this.

Q. Well, anyway, what trade did you work at in New York?

A. Pants operator.

Q. In a shop?

51 A. Yes, sir.

Q. For how many years?

A. Two years.

Q. Then what did you do after the two years?

A. I work — another gentleman, another shop, the same trade.

Q. How many years altogether did you work at the tailoring trade?

A. Over eight years.

Q. Then you came to Buffalo?

A. Then I came to Buffalo.

Q. Why did you give up the tailoring trade?

A. Because I was sick on my lungs.

Q. In what way were you sick?

A. On the lungs.

Q. Lungs?

A. Yes. The doctor advised me to go —

Mr. Wheeler: Just a minute. I object to a narration of his physical condition eight years before.

The Court: I think it is historical. I think if you lead him in a proper way he won't object.

Q. You went into what business?

A. I came to Buffalo and I went in the huckster business.

Q. How long since you came to Buffalo?

A. Ah, —

Q. How long is it now?

A. About five years; fifth year.

52 Q. Will you tell the Court and jury what happened on January 23, 1918, at your house? Just tell?

A. It was January 23, 1918. I came home from my work and left the horse in the barn. I make ready for next day to go on the market. Then I went up in the house and dress myself and wash myself to go up to my sister because my wife was there invited for supper. At the time when I took my coat to go down a knock in the door.

Q. When you took your coat?

A. Yes.

- Q. It was January 23, 1918?
A. I came home from my work about seven o'clock.
Q. Talk loud.
A. I make ready to give the horse to eat. I make ready everything for next day to go out on the market.
Q. You may say when you came home.
A. About seven o'clock. I went up in the house.
Q. Then you went in the house?
A. And wash myself, dress myself.
Q. And dressed yourself?
A. Yes.
Q. Why? Where were you going?
A. Because my wife was by his sister. 94 Sherman street.
Q. Your wife was over by your sister's?
53 A. Sister's on Sherman street.
Q. Where did you live?
A. On 78 Sherman.
Q. Where did the sister live?
A. 94 Sherman.
Q. She was over there?
A. Yes, sir.
Q. You were invited over there for supper?
A. Supper.
Q. Then go ahead, tell what happened.
A. Then I washed myself, dressed myself. I wanted to take my coat to go down to this sister's.
Q. You wanted to take your coat?
A. I wanted to take my coat. Some fellows knocked at the door.
Q. You heard a knock at the door?
A. Yes. I went to go to open the door and they come in at once.
Q. Who came in?
A. Mr. Magwood was the first. He started to search me; the rest searched all the house.
Q. Mr. Magwood is the gentleman with the gray hat in his hand?
A. Yes, sir.

By the court:

- Q. What time was this, in the evening?
A. Why, after seven.

By Mr. Holender:

- 54 Q. Mr. Magwood came in. What did he do?
A. He came in, said, "You are Kastenbaum?" I said,
"Yes, sir."
Q. Did he search you first?
A. He asked me first. I say, "What is the matter?" Then he said, "You are the man break the carload of butter and you are a crook," and he started to search me again. I say, "What is the matter?"
Q. What did he say when you said, "What is the matter"?

A. He said, "You are the man that stole the load of butter."

Q. What did you tell him?

A. He started to search me. I said, "I am not the man. You are mistaken." He started to search me. I say—frighten me—"You gentlemen you are mistaken. I am not the man you are looking for." They go around, search the house.

Q. The rest of the officers searched the house?

A. Yes, searched all the house.

Q. Well, then what did he say to you, if anything?

A. Mr. Magwood say again that I am the dirtiest crook can be because I broke in the car. I say, "I am not." He say, "Yes, sir, you are the man."

Q. What else did he do?

A. He said to the rest of the men he shall take me to the police station. I say, "You are mistaken you gentlemen won't take 55 me." He said, "Never mind, you are the man stole the butter."

Q. Did he say anything about your horse that he found?

A. He say he found a white horse and wagon. "We got the horse, the horse belonged to you." I say. "Mister, you are mistaken, it is not mine horse and only horse I got is in the barn. I show him to you." He said I bought the horse in the stockyard.

Q. That is the horse you bought?

A. In the stockyard.

Q. That horse you had in the barn that night you had bought in the stockyards?

A. Yes, sir.

Q. How long ago?

A. About a week ago.

Q. You gave Mr. Magwood that receipt?

A. He see the receipt; he took it away.

Q. You gave it to him?

A. Yes.

Q. Well, what did they do, take you along?

A. Then they took me down, then he took me down. I say. "Please let me hand my keys to my wife because she is in family way, she get worried about me."

Mr. Wheeler: Just a minute. I object to any testimony in regard to the condition of his wife.

The Court: This is his conversation at the time with this officer. I suppose it is competent. It would not be otherwise. Certainly competent under those circumstances.

56 Mr. Wheeler: Exception.

Q. What did you tell him?

A. I say. "Please let me hand the keys to my wife; she is by 94 Sherman, she get worried about me, she is in the family way, I am afraid she get sick." They say. "Never mind your wife, come on." They take me to police headquarters.

Q. The whole bunch of fellows?

A. Yes, take me to police headquarters.

Q. What did they do there?

A. They ask me again, they say I am the man that stole the butter, I am a crook, and they call me such names, funny names, and they locked me up.

Q. They locked you up?

A. Yes, sir.

Q. Did they take your picture?

A. They lock me up. I say again before they lock me up, "Please let me know my wife because she got worried she get sick." They say, "Never mind." They locked me up until the middle of the night. I say. "Please let me know my wife where I am." They wouldn't let me know, but in the middle of the night, about one o'clock, they give me the phone and I call up my wife where I am. The next day in the morning they take me in the office again, they take me up-stairs, they take the picture of me and the prints all from the top to the bottom; then I went to the court about eleven o'clock.

Q. Went to the court about eleven o'clock?

57 A. Yes.

Q. Were you ever arrested before?

A. Never in my life.

Q. And then you went to court. You were bailed out?

A. Bailed out, \$2,000.

Q. Then how many times did the case get laid off?

A. About five or six times I remember.

Q. And you were discharged?

A. I was discharged.

Q. You didn't take the stand or anything, did you?

A. No.

Q. You didn't have to take the stand?

A. No.

Q. How many days altogether did you lose because of this affair? You were locked up on the 23rd. You didn't work the next day, did you?

A. No.

Q. Did you work the day after that?

A. No, sir.

Q. How many days did you lose at the beginning from that first day, the day you were in court?

A. I lost three days the first day when they arrested me.

Q. Why didn't you work?

A. Because I was awful nervous because I was arrested, the first time in my life.

Q. Nervous?

58 A. Nervous, yes, I was sick.

Q. And you didn't work about three days?

A. Three days.

Q. Then every time the case came up five or six times you lost a day?

A. Lost a day.

Q. You lost about how many days altogether do you claim you lost, you say you lost?

A. Seven or eight days, I think.

Q. About seven or eight days. What were your earnings? What were you making a day at that time?

A. Making from eight until ten dollars.

Q. Average about \$10 a day?

A. Yes.

Q. What was your business?

A. Huckstering.

Q. Explain that.

A. I am a huckster, I buy vegetables on the market, I go out and sell to my customers.

Q. You have a trade?

A. Yes, I got a route.

Q. So you lost eight or nine dollars a day for seven or eight days?

A. Seven or eight days.

Q. Did you have any expense for lawyers?

A. Yes, sir.

Q. How much did you spend for lawyers?

A. \$105.

Q. That included your lawyers fees and expenses that you had?

59 A. Yes.

Q. Did you ever have a white horse?

A. Never in my life.

Q. How many horses did you ever have in your life?

A. Two horses.

Q. You never had a horse until you came to Buffalo?

A. No, never in my life.

Q. What kind of horses did you have while you were in Buffalo?

A. I had a horse with my—a bay horse; he is my brother-in-law

Mr. Kulick.

Q. He was the fellow took you first time in partnership?

A. Louis Kulick.

Q. Where does he live?

A. 94 Sherman.

Q. He took you when you came to Buffalo and taught you about this huckstering?

A. Yes, sir.

Q. Then you were in partnership with him?

A. Yes, sir.

Q. How long were you in partners with him?

A. About seven or eight months.

Q. When did you dissolve partners with him?

Mr. Wheeler: Just a minute. I object to any evidence of the partnership on the ground it is immaterial.

The Court: How long ago was this?

60 Mr. Holender: This partnership? Two years prior to the arrest.

The Court: You just want the date of it?

Mr. Holender: That is all.

The Court: Objection overruled.

Q. When did you dissolve partners with your brother-in-law Kulick?

A. On January.

Q. What year?

A. 1916.

Q. And you were arrested in what year?

A. In 1918.

Q. In what month?

A. In January the 23rd.

Q. January 1918?

A. Yes.

Q. The first horse you ever had was what you got from your partner?

A. With my partnership.

Q. What kind of a horse was that?

A. Bay horse.

Q. The other horse that you bought?

A. Black horse. I got him in the—

Q. You bought him in January 1918?

A. January 1918.

Q. The only two horses you ever had in your life?

A. Yes, sir.

Q. You never had a white horse?

A. Never.

61 Mr. Holender: You may ask.

Cross-examination.

By Mr. Wheeler:

Q. Let me see. Mr. Kastenbaum, when you came to Buffalo about eight years ago did you say, or five years ago?

A. Five years ago.

Q. And went into the huckster business with your brother Mr. Kulick?

A. In 1915.

Q. And you had one bay horse when you were with him?

A. Yes.

Q. That is the only horse you had when you were with him?

A. Yes, sir.

Q. And the horse that you got at the present time is what color?

A. Bay horse.

Q. Both of them bay horses?

A. No.

Q. Wouldn't call either of them a sorrel horse?

A. That horse I had of Mr. Kulick was a bay horse.

Q. One of them was a sorrel horse?

A. No.

Q. Those are the only two horses you ever had?

A. In my life.

Q. As I understood you, you bought your last horse just about a week before you were arrested, is that right?

62 A. About a week, yes.

Q. And you had dissolved partnership with your brother-in-law about two years before that time?

A. Yes, sir.

Q. What horse did you drive after you dissolved partnership with your partner?

A. The same horse.

Q. What horse did he drive?

A. The bay horse.

Q. He drove the bay horse that you had?

A. We got a partnership with him and I had a horse.

Q. But you dissolved that partnership two years before you were arrested, didn't you?

A. Yes.

Q. Now, did you take the horse that you used to drive or did he?

A. I took it.

Q. Well, did he buy another or what did he do?

A. He got in different business.

Q. He went in different business.

A. In junk business.

Q. When did you get rid of the horse that you had when you were partners?

A. Pardon me? Say it again?

Q. When did you sell or get rid of the horse that you had when you were partners?

A. You mean that bay horse?

Q. Well, I mean the horse that you drove when you were partners.

63 A. I take it from him. I buy him out.

Q. Well, when did you get rid of that horse?

A. The same week when I bought that horse.

Q. So you sold him in January 1918?

A. Yes.

Q. And you bought the other one in January 1918?

A. Yes.

Q. You were a huxster?

A. Yes, sir.

Q. Doing business on what market?

A. On Elk Street market.

Q. Elk Street market?

A. Yes.

Q. You know Mr. Penfold there on the market?

A. Yes, sir.

Q. You did business with him?

A. Yes.

Q. You . . . it there every day, did you?

A. On the market every day.

Q. With your wagon?

A. Yes.

Q. And your horse?

A. Yes.

Q. And frequently did business with Penfold?

A. Not every day with Penfold.

Q. Well, very often with Penfold?

A. Mostly some times.

Q. On the night of December 20, 1917, where were you?

A. I am on the market every day.

64 Q. On the night of December 20, 1917, where were you?
A. When I finished my work I come always home. I never was in no place.

Q. I am not asking you what you usually did but do you remember or can you say where you were on the night of December 20, 1917?

A. I am always home when I come from work.

The Court: He didn't ask you that. Now read the question.

Q. (Question read.)

A. I don't remember. Always when I come home I am home.

Mr. Wheeler: I move to strike out the latter part.

The Court: Strike out the latter part.

Q. Have you any recollection as to where you were on the night of December 20, 1917?

A. No.

Q. You can't remember what you did that night?

A. No.

Q. What time in the evening did you generally get home from your work?

A. Six o'clock.

Q. Did you ever get home as early as four o'clock?

A. Never.

Q. You want to tell this jury that you were not arrested about five o'clock on the afternoon of January 23, 1918?

65 A. I was arrested about seven o'clock.

Q. You are sure of that?

A. I think it was seven.

Q. It is not possible that it could be as early as five?

A. So much I remember I think it was about seven o'clock.

Q. Didn't your wife visit you that night down in police headquarters?

A. No.

Q. You didn't see her that night?

A. I didn't see her. They didn't let me see her.

Q. You swear to that?

A. Yes.

Q. Did you have a helper who drove with you at any time on your wagon?

A. What?

Q. Did you have a helper who drove with you at any time on your wagon?

A. No, never. I always worked for myself.

Q. Always alone?

A. Yes.

Q. Where is your route in the City of Buffalo?

A. On the City Line, out Clinton street.

Q. Clinton street and the City Line?

A. Yes.

Q. Did you ever go out Main street?

A. Never.

Q. Do you know where Main street is?

A. Yes.

66 Q. Did you know where Main street was at the time that this arrest took place?

A. I know where Main street is.

Q. Do you remember telling one of the police officers who arrested you you had never been on Main street?

A. I was on Main street but I don't—he told me if I know the place where he found the butter; I say I don't know where that place is. That is what I said.

Q. You didn't tell one of the police officers then that you didn't know where Main street was?

A. I say I don't know where that it is where they claim.

Q. Did you tell one of the police officers at the time that you didn't know where the Elk street market was?

A. I don't remember.

Q. Well, you did know?

A. I know where the market is.

Q. Well, did you tell one of them that you didn't know where the market was?

A. I say I know where the market is because I pass every day on the market.

The Court: You didn't answer the question. Read the question.

Q. Do you understand my question?

A. Yes.

Q. Did you tell one of the police officers who arrested you on the night they came to your house that you didn't know where 67 the Elk street market was?

A. I didn't say not.

Q. You didn't say that?

A. No.

Q. All right. Now, no handcuffs were placed on you?

A. No.

Q. And you were simply told to come along, were you not?

A. Well, yes, sir.

Q. And you all went down in a street car, didn't you?

A. Yes.

Q. And you were taken to the headquarters there at that time?

A. Yes.

Q. At the time that you were photographed, at the time your finger prints were taken—

A. Yes.

Q. —Mr. Magwood was not around, was he?

A. I didn't see him. I don't remember. It was another officer.

Q. Do you remember a man by the name of Jones coming to see you on the day that you were arrested?

A. It was a lot of fellows but I don't know their names.

Q. Well, you have got no recollection of a man by the name of Jones coming to call upon you?

A. I know only Mr. Magwood was the first, I remember him good.

68 Q. Before the police officers came do you remember anybody coming to call on you? Just say yes or no so the stenographer can get it.

A. I don't remember.

Q. Before this charge was placed against you you sued the Lehigh Valley Railroad Company one time, didn't you?

A. Yes.

Q. In another case?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. You never brought suit against the Lehigh Valley Railroad Company?

A. Never in my life.—Oh, one time I was accidentally, I was hurt with a railroad.

Q. One time you had a wagon smashed up at a crossing, didn't you?

A. Yes.

Q. And you brought suit against the Railroad Company?

A. Yes.

Q. And you were driving a sorrel horse at that time, were you not?

A. The same horse what I had with Mr. Kulich, the bay horse, the same horse.

Q. You say that is the same horse?

A. Yes.

Q. Did you drive the same rig in the winter and the summer?

A. Yes, sir.

Q. Were you selling produce—

69 A. On Clinton street.

Q. Wait just a minute. Were you selling produce in December 1917?

A. Yes.

Q. In the month when this matter occurred?

A. Yes.

Q. Month before you were arrested?

A. I was all the time I am selling.

Q. Peddling that through the streets?

A. Yes.

Q. You did that during the day time and came home about seven o'clock, you say, generally?

- A. January, yes.
Q. You have been convicted of a crime?
A. Never in my life.
Q. You said your partner went in the junk business?
A. Yes.
Q. Did he have a horse?
A. He bought another horse.
Q. What kind of a horse did he buy?
A. I don't remember the kind but he bought another horse.
Q. You lived at 78 Sherman street?
A. Yes, sir.
Q. Your partner lived at 94?
A. Yes, sir.
Q. Do you know a man by the name of Gladner?
A. Yes.
Q. He lives where?
A. On 110 Sherman.
70 Q. It isn't 98, is it?
A. No, 110.

Redirect examination.

By Mr. Holender:

- Q. Where did Gladner live?
A. At 110 Sherman.
Q. Where did he live in January 1918?
A. On 110 Sherman.
Q. Did he ever live at 78 Sherman street?
A. Yes.
Q. Gladner?
—. I don't remember; when I came to Buffalo I don't know where
he lives.
Q. Did he ever own that building 78?
A. The building belongs to him.
Q. At the time you were arrested Gladner owned 78 Sherman
street?
A. No.
Q. I say. Gladner was the owner of 78 Sherman street?
A. No.
Q. Was he before you were arrested?

Mr. Wheeler: I submit he has answered that.

- Q. Now, Mr. Kastenbaum, just listen; answer the question.
A. Yes, sir.
Q. Who was your landlord of 78 Sherman street?
A. At the time when I was arrested?
Q. Yes.
A. Mr. Kirschbaum.
71 Q. Do you know who was the owner of 78 Sherman street
before Mr. Kirschbaum?

- A. Mr. Gladner.
A. What was his business?
A. This time?
Q. At that time?
A. He was a jockey.
Q. Gladner was a jockey?
A. Yes.

Mr. Wheeler: Not at the time; he said Kirschbaum was.

- Q. Did you ever buy any horses from Gladner?
A. Never.

Mr. Holender: That is all. That is our case, Your Honor.
Plaintiff rests.

Mr. Wheeler: If the Court please, the defendant now moves to dismiss the plaintiff's complaint upon the following grounds; first, upon the ground that no cause of action for malicious prosecution can lie against the defendant; second, upon the ground that upon all the facts the plaintiff has failed to prove a cause of action.

The Court: Mr. Wheeler, perhaps I do not quite follow your distinction. His complaint may set out an alleged malicious prosecution in that the information was sworn to, there being no warrant issued upon the information, there could not be, could there, exactly, a malicious prosecution?

72 Mr. Wheeler: Well, I should think not. Further, I think no malice can be imputed against this defendant and I do not think any cause of action for malicious prosecution will lie.

The Court: I do not understand they are relying on malicious prosecution, are you?

Mr. Wheeler: He has alleged both in his complaint. My motion is directed towards the cause of action for malicious prosecution, as I view it.

The Court: What do you say, Mr. Holender? You rely on both malicious prosecution and false arrest?

Mr. Holender: These actions are consistent. This man was arrested without a warrant on the false arrest prosecution, without an information and warrant; next morning they lay this information.

The Court: But they issued no warrant upon it, so where is your process?

Mr. Holender: I believe the laying of the information is sufficient to connect—

Mr. Wheeler: He is already in custody.

Mr. Holender: —to connect the defendant with this arrest.

The Court: I am going to grant his motion with regard to malicious prosecution. I believe your action is for false arrest. An arrest was made before your information was issued; no warrant was obtained after the information.

73 Mr. Holender: I respectfully except.

The Court: Not ruling now as to the allegations or any of the claims.

Mr. Holender: Just the theory of the action, false arrest action.
The Court: Otherwise your motion is denied, Mr. Wheeler.
Mr. Wheeler: Exception.

HERBERT ZENFELS, was called as a Witness in behalf of the Defendant and was duly Sworn.

Mr. Wheeler: Before I examine Mr. Zenfels I think I will read a stipulation in evidence here. It has been signed by both parties.

"It is hereby stipulated by and between the attorneys for the respective parties hereto, first, that shipments of butter were made from Albert Lee in Meadford Minnesota, to American Stores Company, Philadelphia, Pa., over various railroads and over the Lehigh Valley Railroad from Suspension Bridge, N. Y. to Philadelphia, Pa., that said shipments were contained in car N. Y. D. 930 on December 20, 1917, that upon arrival at Philadelphia said shipments were found short by 20 tubs and that the value of the shortage amounted to a sum in excess of \$500; second, that the said tubs which were missing from the said shipment were the same
74 tubs contained in the wagon struck by the trolley car of the International Railway Company on December 21, 1917, and were later taken to No. 6 Police Station."

Direct examination.

By Mr. Wheeler:

Q. Mr. Zenfels, who are you employed by?

A. International Railway Company.

Q. How long have you been employed by the International Railway Company?

A. Nine years.

Q. In what capacity?

A. Motorman.

Q. Were you employed as a motorman in December 1917?

A. I were.

Q. What run were you operating on?

A. Main street.

Q. That night did an accident occur in which your car was concerned?

A. Yes, sir.

Q. Can you tell what time that was, or approximately what time it was?

A. Well, it was along about midnight.

Q. Or was it shortly thereafter, after midnight?

A. I couldn't say.

Q. That would be the early morning of the 21st?

A. Just about, yes, sir.

Q. What way was your car going?

A. South on Main street.

75 Q. Just tell the jury, if you will, what occurred on that run.

A. Well, I left Jefferson and Main street on the—to proceed on my trip down Main street; I got just about as far as Carnival Court; right after—the lights were out anyhow; just this side of Forest Lawn somewhere, and coming along just as fast as the car could travel when I got about eight feet this side of this wagon—it was loaded with this butter—on the car track, I couldn't see it until I was eight feet on—before I was right on top of it, so I applied my brakes and it hit it and knocked it over; in fact, I hit it three times before I got the car stopped.

Q. After the accident. Mr. Zenfels, did you get out of your car?

A. I did.

Q. And did you discover the wagon which was there?

A. Yes, sir.

Q. Did you observe the driver of the wagon?

A. Didn't see any driver.

Q. Did you observe any other man on the wagon?

A. Didn't see nobody on the wagon.

Q. Did you look around there at all?

A. Why, after I got off, load was dumped there, I looked around, I says, "There must be a driver on this wagon." At the same time I stepped off the car, I looked up towards Jefferson.

Q. What did you see?

76 A. I noticed two fellows running. Just happened to be dumped over a snow bank. I said, "If there was a driver he wouldn't be running away. They must be buried underneath the load." So I says to a few passengers, "Let us dump this load and see if they ain't buried underneath there." We unloaded the whole load, there wasn't anybody underneath there.

Q. You found some tubs of butter there, did you?

A. Butter, yes.

Q. Later, Mr. Zenfels, did a police officer come up?

A. He did.

Q. Do you know who that was?

A. No, I don't remember who it was.

Mr. Wheeler: That is all.

Cross-examination.

By Mr. Holender:

Q. Who subpœnaed you at the time in police court in 1918?

A. Who subpœnaed me?

Q. Yes.

A. Why, Lehigh Valley people, I believe.

Q. Were you up in the office of Kenefick, Cooke, Mitchell & Bass at that time?

A. Yes.

Q. And also in the Lehigh Valley claim office?

A. No, sir.

Q. Or some office?

A. Don't remember, no, sir.

77 Q. Just the Lehigh Valley attorneys, is that the only place you were to?

A. That is where I was to.

Q. Mr. Magwood at that time subpoenaed you?

A. Yes, sir.

Q. The last gentleman there (indicating) Mr. Magwood?

A. Yes, sir.

Q. He is the one that subpoenaed you?

A. Subpoenaed me.

Mr. Holender: That is all.

EARL M. ALSWORTH, was called as a Witness in behalf of the Defendant and having been duly Sworn testified on Direct Examination by Mr. Wheeler as follows:

Q. Officer, you are connected with the police force of the city?

A. Yes, sir.

Q. And you have been for how many years?

A. About thirteen years.

Q. Will you state what station you were attached to and what beat you were on on the evening of December 20, 1917, and the early morning of December 21st?

A. No. 6 Police Station. I forgot the number of the beat now.

Q. Just state, if you will, in what vicinity or what locality your beat took you.

A. My boundary lines was Delevan avenue and Main street and up to Humboldt Parkway.

78 Q. Were you in the vicinity of Carnival Court at the time of the accident the last witness has described took place?

A. Yes, sir.

Q. How far away from the point where the accident occurred were you?

A. Why, perhaps 400 feet.

Q. Did you actually see the accident occur or not?

A. No, sir.

Q. Did you hear it?

A. Yes, sir.

Q. State, if you will, what you did after that happened.

A. I ran down to where the accident happened and the conductor and motorman had unhitched the horse and was tied to the tree.

Q. Just describe the horse to the jury.

A. The horse was a large, quite large bay mare.

Q. Bay or white?

A. Well, I mean white, white mare, with large shoulders, very distinguishable.

Q. Any particular kind of a neck that you could describe?

A. Large neck, yes.

Q. Anything noticeable about its legs?

A. They were large, heavy hoofs with long hair running to the hoofs.

Q. What you call fetlocks?

A. Yes, sir.

Q. What had become of the wagon at the time you got
79 up there?

A. The wagon was laying on the side, demolished, and on
the snow drift.

Q. Did you see any tubs of butter there?

A. Yes, sir.

Q. Did you see the driver of this rig there?

A. No, sir.

Q. Did you see anybody outside of the motorman and passengers?

A. No, sir.

Q. What did you do about taking care of this horse and rig?

A. I called the patrol wagon; we loaded the butter into the patrol
wagon and took the butter and horse to No. 6 Police Station.

Q. Then do you know what became of that horse?

A. The horse was taken to No. 1 patrol barn. I don't know what
they did with it there.

Q. Did you see it there?

A. Yes, sir.

Q. Is that on Henry street?

A. Yes, sir.

Q. And you actually yourself saw that horse at Henry street?

A. Yes, sir.

Q. Was the wagon taken there too, do you know?

A. No.

Q. Do you know anything more about this, Officer?

A. No, sir.

80 The Court: Was the wagon taken away that night, the
time the horse was?

The Witness: Yes, sir.

Cross-examination.

By Mr. Holender:

Q. You saw nobody who was driving that, did you?

A. No, sir.

Q. Did Mr. Magwood subpoena you for police court at that time?

A. Yes, sir.

Q. He was working on this case, did he tell you?

A. Yes, sir.

Mr. Holender: That is all.

AUSTIN J. ROCHE, was called as a Witness in behalf of the Defendant and having been duly Sworn testified on Direct Examination by Mr. Wheeler as follows:

The Witness: 132 Glenwood avenue.

Q. Officer, you are connected with the Police Department of the
city?

A. Yes, sir.

Q. And you have been for how many years?

A. Fourteen years

Q. What station are you connected with?

A. Assigned to headquarters.

Q. Were you working from headquarters in January 1918?

A. Yes, sir.

81 Q. Do you recall the occasion when Mr. Kastenbaum the plaintiff here was taken into custody?

A. Yes, sir.

Q. Who was present at that time. Officer?

A. Officer McDade and Officer Flesh of the Police Department and Officer Magwood of the Railroad Department.

Q. Yourself?

A. Myself.

Q. Where was Kastenbaum taken into custody?

A. At his home I think 78 Sherman street.

Q. Do you remember what time of day it was that you——

A. It was about 4:30 in the afternoon.

Q. You went there before supper?

A. Yes, sir.

Q. Where did you find him?

A. Sitting in his—one of his rooms of his home.

Q. Did you search his premises?

A. No, sir.

Q. Did you search him personally?

A. No, sir, not there.

Q. Was a search later made of him?

A. Yes, sir.

Q. That was where?

A. Police headquarters.

Q. Were any handcuffs put on the man?

A. No, sir.

82 Q. When was he taken to police headquarters?

A. Immediately.

Q. Do you know, Officer, whether his wife visited him that evening or not at police headquarters?

A. Why, to the best of my recollection she did.

Q. You think he was taken down there by half past five?

A. Yes, sir.

Q. Do you know whether anyone was sent to see Kastenbaum before the arrest was made? Did you have anything to do with that?

A. No. I did not.

Q. Do you know anything more about this, Officer?

A. No, sir.

Cross-examination.

By Mr. Holender:

Q. Officer, are you sure about the time, for instance, 4:30, that you were there? It might have been six?

A. No, it was 4:30; it may have been 4:45.

Q. You are kind of certain about it?

A. Absolutely.

Q. You had a warrant for his arrest that night.

A. No, not at that time.

Q. How is that? Are you sure?

A. Not at that time.

Q. Are you testifying from what you heard here since you have been here?

83 A. No, sir, testifying from what I know.

Q. From your personal knowledge?

A. Absolutely. Yes, sir.

Q. What did you testify to in police court? Have you any recollection?

A. I haven't.

Q. None?

A. None at all.

Q. Do you remember that you testified that you had a warrant for his arrest (showing minutes to witness)? "Tell the Court what transpired at the time you arrested him."

"A. We went to this man's apartment, the upper flat at 78 Sherman street." That is right, is it not?

A. Yes, sir.

Q. "The defendant was in the flat all alone." That is right?

A. Yes, sir.

Q. "We had a warrant for his arrest. We went in there and talked with the defendant. I looked through the house to see if anyone else was there." Do you remember testifying to that.

A. I don't recall testifying to that.

Q. Would you be so sure about the time that you were there, that it was not six or seven o'clock?

A. I know that it was previous to 5.30.

Q. Then you say you don't recall testifying in police court—

A. I don't know, not to that.

84 Q. —that you had a warrant? I show you your testimony. "Do you think you had a warrant at the time or was the information laid the morning he was arraigned in police court?" Your answer, "No, we had a warrant when we went in there." "You think you had a warrant?" "Yes. I am sure of it."

A. I don't remember that.

Q. Now you say that you are not sure about that part of it?

A. I am not sure. I don't remember of testifying to the warrant.

Q. But here is all this cross examination and direct examination.

A. I see it.

Redirect examination.

By Mr. Wheeler:

Q. Well, you don't claim now you did have any warrant?

A. Not to my recollection at this time.

Q. By the way, did Officer Flesh in your presence ask the man any question as to his occupation?

A. Yes, sir.

Q. Did he ask him in your presence if he knew where the Elk street market was?

A. Yes, sir.

Q. What did he say?

A. He said he didn't know where the Elk street market was.

85 Recross-examination.

By Mr. Holender:

Q. Mr. Roche, on re-direct examination you were asked by Mr. Downey, attorney for the Lehigh, "Officer, at the time you took the defendant into custody did he deny knowing where Michigan street was?" and your answer was. "He would not admit knowing anything." Is that right? He would not admit anything when you questioned him?

A. He denied that he knew where Main street—

Q. I say, he wouldn't admit it?

A. He wouldn't admit it?

Q. "He would not talk, is that it, Officer?" Answer, "He would not talk"?

A. That is practically it.

Mr. Holender: That is all.

THOMAS H. FLESH, was called as a Witness in behalf of the Defendant and having been duly Sworn testified on Direct Examination by Mr. Wheeler as follows:

The Witness: 524 Walden avenue.

Q. Officer Flesh, you are connected with what station?

A. No. 3 Police Station at present.

Q. Where were you connected in January 1918?

A. Detective bureau.

Q. Were you one of the officers who were present at the time that the arrest of Kestenbaum was made?

86 A. Yes, sir.

Q. Do you recall, Officer, what time of day it was you went down there to make the arrest?

A. Went down there in the afternoon, that is, around there in the afternoon, and waited until, I think about, would judge about after four o'clock.

Q. Do you recall whether or not anyone was sent in to see this man before you made the arrest?

A. There was a man around there Magwood sent some place.

Q. And Magwood was with you at the time?

A. Yes, sir.

Q. At the time that you made the arrest were the premises searched by you?

A. No, sir.

Q. Did you search the man there?

A. No, sir.

Q. Were handcuffs placed upon him?

A. No, sir.

Q. Was any violence used?

A. None whatever.

Q. Do you recall, Officer, whether his wife visited him that night or not at police headquarters?

A. To the best of my remembrance she came there that evening about probably nine o'clock in the evening.

Q. You were present?

A. I was.

87 Q. Was there any conversation held with the man at the time that he was arrested?

A. Yes, we asked several questions there about what his business was and where he had been on certain dates.

Q. He gave you his business?

A. Yes.

Q. And was there any question asked of him as to if he knew where Elk street market was?

A. Yes, sir.

Q. What did he say?

A. He said he didn't know where the Elk street market was but later he admitted he knew where the Michigan street market was; he called it Michigan street.

Q. Was there any question asked him whether he knew where Main street was, or not?

A. Said he didn't know where Main street was.

Cross-examination.

By Mr. Holender:

Q. Mr. Magwood took you along to get this man?

A. We were sent out there with him.

Q. With him?

A. With him to render any assistance we could, that he was looking for a man for committing this robbery.

Q. You were simply there to arrest him?

A. Yes, sir.

Q. He was the man that told you he had a robber he wanted to take and took you and Mr. Roche along for assistance?

88 A. Yes.

Q. When you entered that house you entered there for the purpose of aiding Mr. Magwood to catch this burglar or robber?

A. Yes, sir, to catch a man.

Q. Did you search him to see if had a gun on him?

A. Not there.

Q. Well, did Mr. Magwood, to see whether he had a gun on him?

A. No, I don't remember of touching him at all in the house.

Q. When you pick up an alleged robber or burglar, especially if he happened to be cross-eyed, don't you look in his pocket to see whether he has got a gun or something?

A. No.

Q. You do wait until you get in the police station?

A. Well, in some cases. It all depends on the *the* man.

Q. This man didn't strike you as a very dangerous criminal, in spite of his eye?

A. He was answering him and he didn't offer any resistance.

Q. He told Mr. Magwood—he was examined about him owning a white horse?

A. He said he didn't own a white horse.

Q. Mr. Magwood told him he was the fellow that broke into the freight car and stole the butter?

89 A. Yes.

Q. And he said it wasn't him?

A. Yes, sir.

Q. Mr. Magwood told him that this car that he broke into, that he broke into it a month before his arrest?

A. Yes, about that, yes.

Q. And he said Mr. Magwood was making a mistake. Did he ask Mr. Magwood for the privilege of going over and notifying his wife?

A. I don't remember about that.

Q. You don't remember that?

A. No.

Q. Do you remember his telling Mr. Magwood his wife was sick and she would worry about it if he didn't let him walk over to No. 94?

A. I don't remember about it there. I know when he came to police headquarters he asked Sendfer, to the best of my remembrance, so that he telephoned to No. 8 police station to send a message to the address that he asked for.

Q. When you brought him to headquarters did you lock him up?

A. Oh, I can't say; I don't remember who—

Q. It is out of your jurisdiction?

A. The two of us was around there, Roche and I.

Q. And don't you remember him being taken in to the Inspector and put through a little examination?

90 A. Detective Sergeant Ryan, who was then in charge of the detective bureau, asked him a few questions.

Q. Just a few. Didn't give him the third degree?

A. No.

Q. Did Mr. Magwood tell you that he was a burglar?

A. I havn't formed any opinion about the man.

Q. None of you gentlemen searched this man when you came to his house that night?

A. No, I didn't search him, that is, outside of—

Q. Did you see Mr. Magwood looking through his pockets or touching his pockets?

A. I don't remember seeing anyone.

Q. Would you say that he might have?

A. I don't remember seeing him doing it.

Q. What did Mr. Magwood tell you about this man before you started?

A. Said that this—they suspected him of doing this job, he was the one; they had been working on the case for about a month and they had evidence to prove—

Q. Mr. Magwood told you he had been working on the case about a month and he had sent some fellow down to look at Mr. Kastenbaum, did he tell you that, that he had sent some man by the name of Jones to look him over at 78 Sherman street?

91 A. They had looked at him, seen him some place; I don't know whether it was at his home or not.

Q. Mr. Magwood told you that he had sent some man to his house to look at him?

A. I don't know whether it was at his house or not. He was a huckster and had seen him out on Clinton street.

Q. Mr. Magwood didn't tell you he had sent a man to Kestenbaum's home to take a look at him?

A. I don't think we knew where Kastenbaum really lived at that time.

Q. I didn't ask you that. I asked you whether Mr. Magwood ever told you?

A. No, not to me.

Redirect examination.

By Mr. Wheeler:

Q. Did Mr. Magwood tell you the man he had sent to see this man described him?

A. Yes, he said that he was a Jewish man, a huckster, and that he was cross-eyed or wall-eyed I think was the word that he used at the time.

Mr. Wheeler: That is all.

Mr. Holender: That is al.

HAROLD STURDEVANT, was called as a Witness in behalf of the Defendant and having been duly sworn testified on direct examination by Mr. Wheeler as follows:

Q. Mr. Sturdevant, you are employed by the Lehigh Valley Railroad Company?

92 A. Yes, sir.

Q. And you were working on the Lehigh Valley Railroad in December 1917 and January 1918, were you not?

A. Yes, sir.

Q. You were a car checker down at Manchester?

A. Yes, sir.

Q. In your business as car checker it was part of your duties to look at the seals and to seal up cars?

A. Seal the cars, yes, sir.

Q. Now, the Lehigh Valley runs from Buffalo to Manchester does it not?

A. Yes, sir, through Manchester.

Q. In part?

A. Yes, sir.

Q. Manchester is one of the division terminals?

A. Yes, sir.

Q. It is the next terminal east of Buffalo, as I understand?

A. Yes, sir.

Q. And trains from Suspension Bridge going east would run through Manchester?

A. Into Manchester.

Q. That would be the first division terminal east of Suspension Bridge, would it not?

A. Yes, sir.

Q. Through freights or freight trains that were going on the Lehigh east would stop in Manchester, would they not?

93 A. Yes, sir.

Q. And they are often reclassified there?

A. Yes, sir.

Q. And take on another engine?

A. Yes, sir.

Q. As I understand you, you have got no personal knowledge as to the condition of car N. Y. D. 930 which went through there on December 20th and 21st?

A. No, sir, I don't remember.

Q. And as I understand you, you have looked up your records very recently?

A. Yes, sir.

Q. And found they were destroyed?

A. Yes, sir.

Q. You testified in City Court?

A. Yes, sir.

Q. And at the time this man was charged with a crime?

A. I was here once before, yes, sir.

Q. And testified as a witness?

A. Yes, sir.

Q. And testified at that time from your records?

A. Yes, sir.

Q. After I refresh your recollection as to what you testified to then as to what your records at that time contained, you tell me if that is your recollection. Did you testify "On the date of"—Page 13. Mr.

94 Holender—"December 21, 1917, did you seal car N. Y. D. 930?" to which you testified. "I had a record of it. I don't know now if I sealed it." Is that correct?

A. Yes, sir.

Mr. Holender: Pardon me. I stipulated all those facts for Counsel so as to save him the trouble of bringing the witnesses from out of town, and this witness—

Mr. Wheeler: Mr. Holender, I did not understand our stipulation went so far as to show where they discovered the break in the seal.

Mr. Holender: It did not make any difference.

Q. Well, you testified, did you not: "Where is your record?" Answer. "Right here." "What does that record show?" "It shows N. Y. D. 930 was sealed at Manchester with seal 33-687. "On which side?" "The south side." Question. "That is the right hand side also?" Answer. "Yes." "Question." "What date did you seal that car?" "The night of the 20th." Question. "On the night of December 20th?" Answer. "Yes." "Look at your record again. "The night of December 20th after twelve o'clock though. I put the 20th but it was the night of the 20th." Then question was asked. "Would a record made the morning of the 21st be with the record under the 20th" and you answered. "Yes." Now, that is correct, is it?

A. Yes, sir.

Q. Just one other question, Mr. Sturdevant, that isn't contained in the record. If a car which was shipped from Suspension Bridge to Philadelphia, through car, had to be sealed or were sealed by you at Manchester, would that indicate that it had been tampered with before it reached Manchester?

A. Why, it wouldn't be sealed unless the seal was off.

Q. You wouldn't seal it unless the seal was off it?

A. No, sir.

Q. So that some time before this car reached Manchester the seal must have been taken off?

A. Yes, sir.

Cross-examination.

By Mr. Holender:

Q. At the time, Mr. Sturdevant, of this criminal prosecution of Mr. Kestenbaum you were a witness in police court?

A. Yes, sir.

Q. And you were sixteen years old at that time?

A. Yes, sir.

Mr. Holender: That is all.

Recess until 2 o'clock.

After recess:

BERNARD FREY, was called as a Witness in behalf of the Defendant and having been duly Sworn testified on Direct Examination by Mr. Wheeler as follows:

Q. Where do you live, Mr. Frey?

A. I live now at 88 Peckham.

96 Q. Where did you live in 1917?

A. At 578 William.

Q. Where did you work?

A. I worked at 578 William.

Q. Well, did you work at a garage at any time on Sherman street?

A. Yes, sir, I did.

Q. What number was that?

A. At 79 Sherman street.

Q. Was that in 1917?

A. Yes, sir.

Q. And who did you work for?

A. I worked for my uncle Odell Frey.

Q. Speak up.

A. I done a little repair work for my uncle.

Q. Do you remember, Mr. Frey, at any time seeing a horse in Sherman street with a fine, white, thick neck and heavy fetlocks on its legs, big, fine, white mare, driven through there?

A. Yes, sir.

Q. Will you state when the occasion was when you first saw that horse?

A. One late in the afternoon a man come leading the horse from the—up Sherman street, and inquired where Mr. Gladner lives.

Q. What number was it where you were working?

A. 79. And I pointed out the yard where Mr. Gladner—or the house and the yard where to go, and so he did.

Q. Did you see that white horse driven through there after that?

97 A. I have seen the white horse couple of times after.

Q. At some time in 1917?

A. Yes, sir.

Q. Have you seen that there recently at all?

A. No, sir. I haven't.

Cross-examination.

By Mr. Holender:

Q. Mr. Frey, you have seen other white horses passing through the street, haven't you?

A. Yes, sir.

Q. You didn't know that you had to come to be a witness about some white horse passing through Sherman street, did you? You never expected anything like that?

A. No, sir, I didn't.

Q. You can't tell exactly which horse, which white horse it was that you saw on this occasion, can you? It was a white horse?

A. It was a white horse, yes, sir.

Q. Now, who is it that came to see you and asked you about a white horse?

A. Mr. Magwood.

Q. Mr. Magwood came over to your garage?

A. To the garage, yes, sir.

Q. And asked you if you ever saw a white horse on Sherman street?

A. Yes, sir.

Q. And you told him that a white horse was brought from the stockyards?

A. From the stockyards.

Q. About six months before that day?

98 A. About that time. I don't remember how long before that but I just stated how long, about it was, see.

Q. You told Mr. Magwood you remembered about six months before the day he was talking to you—

A. Yes, sir.

Q. —that some fellow brought a horse with a tag on it from the stockyards?

A. From the stockyards.

Q. And he asked where Emil Gladner's place was?

A. Yes, sir.

Q. You told that man it was 78 Sherman street?

A. Whatever the number was. I don't remember. But I pointed out the yard and house to him.

Q. You testified in City Court, do you remember?

A. Yes.

Q. In that you said. "You told him that he lives at 78 Sherman street?" "Yes, sir." That is what you said. Does this refresh your memory? At that time you knew it was 78 Sherman street, two and a half years ago?

A. I guess that—but I don't know about 78 because 79 was where I was working at the time and it was about four or five houses up further, see. I don't remember the number. Did I say 78 or whatever the number was, see, but—

99 Q. Did you read this testimony you gave in City Court?

Question, "Mr. Frey, all you know is about six months ago some fellow led a white horse?" Answer. "Yes." "Led him over to your garage at 79 Sherman street?" "Yes." "Do you know where Mr. Gladner lives?" "Yes, sir." "You told him that he lives at 78 Sherman street?" "Yes, sir." Does that refresh your memory any as to what you testified to in City Court?

A. Yes, sir.

Q. This is right?

A. Well, I might have been mixed up with the 78 with the number, see.

Q. Well, anyway, it was the house where Gladner lived?

A. Where Gladner lived was about five houses opposite the garage, see. What number I really did give, I didn't know the number really at that time, but I figured on 78, but I just happened to think 78 would have been opposite to me, see.

Q. Well, anyway, you told this man that led the white horse from the stockyards that Gladner lived across the street from your garage, is that what you told that man?

A. No, not across from—I told this man from the stockyard about five houses up, see, and where I seen him go into that yard.

Q. Did you tell Mr. Magwood the same thing you are telling this jury now?

A. Yes, sir.

100 Q. Exactly the same thing?

A. Yes, sir.

Q. You never took any notice as to who ever drove this white horse.

A. No, sir, I didn't.

Q. Did you tell Mr. Magwood that?

A. Yes, sir.

Q. Did he ask you whether a man living across the street from you drove that horse?

A. No, sir, I didn't.

Q. Did you know this Mr. Kastenbaum?

A. No, sir, only by passing by, but I never had no talks with him of any kind.

Q. You never saw him driving any white horse?

A. No, sir.

Q. You have seen him driving a red horse?

A. I don't remember what horse he did drive. I met him on the street, that is, a couple of times before that. I never got acquainted with Mr. Kestenbaum.

Q. Did you see his horse and wagon passing by through that street?

A. I might have.

Q. You never saw him with a white horse?

A. I don't remember. I never noticed, to get to know Mr. Kestenbaum until after this, until after I came for court.

Q. Mr. Magwood came to see you?

A. Yes, sir.

Q. How many times?

101 A. I couldn't tell how many times he come to see me. A couple of times, I should judge.

Q. So you didn't tell him that the white horse that you saw led six months ago was taken into 78 Sherman street? You didn't tell that to Mr. Magwood, that that white horse coming from the stockyards was taken into the yard at 78 Sherman street?

A. I don't think 78; I pointed out to the house and I told Mr. Magwood up there in this yard the horse went.

Q. Do you know Mr. Gladner?

A. I do.

Q. He is a horse jockey?

- A. I couldn't tell you what business he is in, but I know—
Q. But a man from the stockyards asked for Gladner?
A. He asked for Gladner, yes, sir.

Redirect examination.

By Mr. Wheeler:

Q. You went down to the police barn on Henry street and saw this horse, did you not?

A. Yes, sir.

Q. And that was the same horse you saw driven through Sherman street?

A. Why, I couldn't tell you about it, if it was the same, but I says I wasn't quite sure about his fetlocks, that he had these fetlocks the way this horse down there had.

Q. Well, now, you remember testifying in police court or in our City Court?

A. Yes, sir.

102 Q. Just as he said, and you remember that you testified over there, were sworn for the prosecution, were you not?

A. Yes, sir.

Q. Just to refresh your recollection I call your attention to this testimony, Page 84, "Have you been at the police barn on Henry street No. 1 barn?" "Yes, sir."

A. Yes, sir.

Q. You answered, "Yes, sir," then you said, question was asked you, "When did you go there?" which you answered, "It was," and then the question was, "About when?" you said, "About the first of this month, I guess." That was right, was it not?

A. That was right, yes.

Q. "First of February?" Answer, "Yes." Question, "Did you see a horse there?" Answer, "What?" Question, "Did you see a horse there?" and you said, "Yes, sir." That was right, wasn't it?

A. Yes, sir.

Q. Question, "What sort of a horse? Describe the horse you saw." Answer, "It was a white mare, heavy build, and a fine notable horse with a long neck." That was your answer, was it not?

A. Yes, sir.

Q. And the Judge said to you, "A fine what?" and you said, "A fine notable horse with a long neck." Then the Court said, 103 "Go ahead." Mr. Downey asked the question, "Did you see a wagon there?" which you answered, "No, sir." Then he asked this question, "Now then, have you seen that horse before you observed it in the barn?" and you answered, "Yes, sir" didn't you?

A. What is that?

Q. (Shows minutes to witness.)

A. Yes, sir.

Q. The question was then asked you, "Where did you see it?" and you said, "I saw it pass the garage," did you not? Do you remember that?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Recross-examination.

By Mr. Holender:

Q. Is that what you thought? You thought it was the same horse that you saw in the barn on Henry street?

A. I was pretty sure it was.

Q. Now, you testified a little while ago that you wasn't so sure because of the fetlocks, in answer to his question?

A. Well, I says that the fetlocks I didn't remember. I didn't take notice of them passing the street but I see the fetlocks on him down in the barns.

Q. You thought it was the same horse you saw passing on Sherman street?

A. Yes, sir.

Q. That you saw in the barn?

104 A. Yes, sir.

Q. Now, February 1st, 1918, that was the first time that you were ever consulted about this case by Mr. Magwood when you went over to the police station?

A. Yes, sir.

Q. That was in February?

A. I guess so.

Q. Now, you were asked a question, "About the first of this month or about when?" "About the first of this month." "The first of February?" "Yes." That was the time that Mr. Magwood took you over to the barn?

A. Took me over to the barn, yes, sir.

Q. He took you over, didn't he?

A. He took me over to the barn.

Q. So, Mr. Frey, Mr. Magwood came over to your garage and asked you if you had seen a white horse pass the street?

A. Yes, sir.

Q. And he then asked you to go over to the barn with him?

A. Yes, sir.

Q. And he showed you the horse?

A. Yes, sir.

Q. And he told you that that is the horse that used to pass through Sherman street, didn't he? He told you that that is the horse and he wanted to know whether you saw him?

105 A. He asked me if this was the horse that I seen pass the garage.

Q. What did you tell him, you thought it was?

A. I says, "I am pretty sure it is."

Q. Didn't you tell him you thought it was?

A. I says, "I am pretty sure it is but I don't remember he having the horse having these fetlocks."

Q. So you—

A. This is what I said to Mr. Magwood.

Q. So you didn't tell him for certain, did you? You told him, "I thought it was that horse"?

A. I says, "I am pretty sure." Of course, there is a lot of white horses.

Q. And that is what you told him, didn't you?

A. Yes, sir.

Q. That there are a lot of white horses and you couldn't be certain; you were pretty sure?

A. "I am pretty sure," that is what I said.

Q. You wouldn't make it any stronger?

A. Yes, sir.

Q. He asked you if you were not certain?

A. Yes, sir.

Q. You told him you were not certain because of this difference?

A. I told him I am pretty sure, it was the horse that passed the garage.

Q. But you have seen a lot of white horses around there?

A. Yes, sir.

Q. You don't know who ever drove this horse?

A. No, sir.

Q. Did you tell Mr. Magwood you never say anybody drive that horse?

106 A. I did.

Q. And this was around February 1st?

A. About the time.

Q. Did you know that—Did Mr. Magwood tell you that some man was arrested and he wanted to prove that it was his horse? Do you remember that?

A. He did when he took me down to the barns.

Q. Did he tell you that man was arrested, he wants to prove that it was his horse?

A. Yes, sir.

Mr. Holender: That is all.

HARRY BLEICH, was called as a Witness in behalf of the Defendant and having been duly Sworn testified on Direct Examination by Mr. Wheeler as follows:

Q. Where do you live, Mr. Bleich?

A. 323 Madison street.

Q. Who are you employed by?

A. I am employed by F. P. Coward & Son at the time he was at Penfold, then I went out to Perry street, away.

Q. But you are working down on the market again now?

A. Yes, sir, for Coward, F. P. Coward & Son.

Q. Was it Penfold & Peppard you were working?

A. Penfold & Peppard.

Q. That was along about December before that in 1917?

107 A. Yes, sir.

Q. How long did you work for them?

A. Oh, about seven months or so.

Q. You know who the plaintiff in this action Samuel Kastenbaum is?

A. Yes, sir.

Q. Did you ever see him down on the Elk street market?

A. Yes, sir.

Q. Did he come to your store there?

A. Yes, sir.

Q. Sell him produce?

A. Sold him bananas and potatoes. That is all we handled down there.

Q. What sort of a horse did he drive?

A. A white horse?

Q. White horse?

A. Yes, sir.

Q. Just describe the character of the horse, if you can.

A. I can't describe him. It was a white horse, that is all I know.

Q. Do you know whether it is a stallion or a mare?

A. I can't tell a stallion; I can't tell a mare.

Q. What sort of a wagon did he drive?

A. Green wagon, red shafts.

Q. Were you interviewed by Mr. Magwood before the trial in City Court?

A. Yes, sir.

Q. Did he take you down to the police barn on Henry street?

A. Yes, sir.

108 Q. Did he show you a horse down there?

A. Yes, sir.

Q. Did he ask you whether that was the horse that Kastenbaum drove?

A. Yes, sir.

Q. What did you tell him?

A. I told him I think it was his horse.

Q. You think it was?

A. Yes, sir.

Mr. Holender: You thought it was?

The Witness: Yes, sir.

Q. Same horse that you had seen Kastenbaum drive?

A. Yes.

Q. He had been down there frequently on the Elk street market?

A. Yes.

Q. And you had often seen him down there?

A. Yes, sir.

Q. Remember about what time he stopped coming down there?

A. 18th, I think.

Q. Of what?

A. Of September.

Q. That was some little time before the trial?

A. Yes.

Cross-examination.

By Mr. Holender:

Q. Mr. Bleich?

A. Yes, sir.

109 Q. Did you tell Mr. Magwood when he took you down to the barn and showed you that horse—did he tell you that that is the horse that Kastenbaum was driving?

A. He said that is the horse that Kastenbaum was driving, yes, sir.

Q. How is that?

A. Yes, sir.

Q. He told you?

A. Yes, sir.

Q. Mr. Magwood told you when he pointed out that horse to you—

A. He asked me if that is the horse Kastenbaum was driving.

Q. What did you say, you thought it was?

A. I thought it was, yes.

Q. Did he tell you what he wanted you to be a witness for?

A. No, sir.

Q. How many times did Mr. Magwood see you altogether?

A. Twice.

Q. When was the first time?

A. The first time he come out to the house, second time at the barns.

Q. Have you ever known Mr. Magwood?

A. Never met him before, no, sir.

Q. Didn't he promise you a job as a railroad detective if you helped him out in this case? Just answer that? Did he promise you a job?

A. Yes, he promised me a job, as railroad detective, yes.

110 Q. He says, "Go over and identify the horse" and he would

promise you a job as a railroad detective?

A. No, he didn't tell me that. He promised me—

Q. He just promised you a job first?

A. Yes.

Q. He asked you where you worked?

A. Yes.

Q. And you told him?

A. Yes.

Q. Did he tell you that he could give you a job as a railroad detective if you wanted it?

A. Yes, sir.

Q. Sir.

A. Yes, sir.

Q. He never told you that this was a criminal case, did he?

A. No, sir.

Q. You were not so sure, were you, Mr. Bleich?

A. At the time no, I wasn't so sure.

Q. Just a moment. You were not so sure when you say that you saw Kastenbaum drive a white horse?

A. No, I wasn't so sure but at the time I thought it was his horse.

Q. You honestly thought it was?

A. Yes.

Q. After he promised you this job, I suppose?

A. No, that ain't got nothing to do with the job.

111 Q. Well, anyway, Mr. Bleich, what this jury wants to know is the facts. You did see Mr. Kastenbaum's wagon with some red shafts, didn't you?

A. Yes, sir.

Q. But as to the color of the horse you were not so sure?

A. I wasn't so sure. I thought it was white, yes.

Q. And you told Mr. Magwood at that time?

A. Yes, I told him it was white.

Q. That you were not so sure?

A. Yes.

Q. Didn't he assure you it was his horse?

A. Yes.

Q. He told you it was?

A. Yes.

Q. And told you that you were making no mistake?

A. Yes.

Q. Did he do that or didn't he?

A. He told me I ain't making no mistake?

Q. He told you you were making no mistake if you say that is his white horse?

A. No, he didn't say anything about that.

Q. What did he say. "Are you sure that is"?

A. Says. "Don't you know?" If I am sure or not.

Q. I came out to see you, do you remember that, with a man, at one time, Mr. Bleich?

A. Yes.

112 Q. In August 1918?

A. Yes, sir.

Q. That was after this trial in City Court?

A. Yes, sir.

Q. At that time you told me that Mr. Magwood told you that Mr. Kastenbaum had an accident with the railroad some time ago?

A. Yes.

Q. That he was suing the company for damages and wanted you to help this man that he used to buy stuff from?

A. Yes, I remember that.

Q. Did he assure you that it was his horse and that he was working for Mr. Kastenbaum's behalf, did he tell you that? Do you remember that?

A. Maybe. I don't remember. I don't know.

Q. You remember, did Mr. Magwood tell you that Mr. Kastenbaum had an accident with the railroad?

A. Yes, I remember that.

Q. And that he was trying to get him some damages?

A. Yes.

Q. When you came out of police court, that is the first time you found out this was a criminal case?

A. Yes, sir.

Q. And that Mr. Kastenbaum was arrested?

A. Yes, sir.

Mr. Holender: That is all.

Mr. Wheeler: That is all.

113 WILLIAM JONES, was called as a Witness in behalf of the Defendant and having been *only* Sworn testified on Direct Examination by Mr. Wheeler as follows:

Q. You live in Cheektowaga, Mr. Jones?

A. Yes, sir.

Q. You are raising pigs out there, as I understand?

A. Yes, sir.

Q. You have dealt in horses during your lifetime, have you not?

A. Yes, sir, I have.

Q. Have you bought and sold horses?

A. Yes, sir, and traded horses.

Q. And you have also been in business as a huckster?

A. Yes, sir.

Q. You have seen the plaintiff here Samuel Kastenbaum?

A. Yes, sir.

Q. And you had seen him prior to his arrest in 1918?

A. Yes, sir.

Q. Do you remember Officer Magwood coming to see you prior to the arrest and asking you if you could identify the owner of this horse?

A. Yes, sir, I do.

Q. Did he take you down to the police barn and have you look this horse over?

A. Yes, sir.

Q. Just describe the horse to the jury, if you will.

114 A. It is a white horse with a heavy mane and tail and big neck and broad shouldered, broad breast, low down, weighs somewhere about twelve or thirteen hundred.

Q. A mare?

A. A mare, yes.

Q. Had you ever seen that horse driven about the streets in Buffalo before that time?

A. Yes, sir, I have.

Q. Who was it you had seen driving it?

A. That man right over there by the table (pointing at the plaintiff).

Q. Did you tell Officer—

The Court: Who is "that man"?

Mr. Wheeler: That man, pointing to the plaintiff (indicating).

Q. Did you inform Mr. Magwood that you had seen that horse driven around?

A. Yes, sir, I did.

Q. Did Mr. Magwood ask you to go to 78 Sherman street?

A. Yes, sir, he did.

Q. Did Mr. Magwood ask you to go to 78 Sherman street?

A. Yes, sir, he did.

Q. Did you go there?

A. Yes, sir.

Q. Alone, before the man was arrested?

A. Yes, sir.

Q. And who did you see at 78 Sherman?

115 A. I see that man right there (pointing to plaintiff).

Q. Pointing to the plaintiff?

A. Yes, sir.

Q. Well, was that the same man you had seen driving the white horse?

A. Yes, sir.

Q. After you had seen him did you come out and inform Magwood about that?

A. Yes, sir.

Q. And, of course, you were not present when the arrest was made?

A. No, no, no, I wasn't.

Q. Later on you testified in City Court?

A. I did, yes, sir.

Q. As a witness for the prosecution?

A. Yes, sir.

Q. And you understand it was after you told Magwood that Kastenbaum was the driver of that horse that the arrest was made?

A. Yes, sir.

Cross-examination.

By Mr. Holdener:

Q. Mr. Jones, may I ask you a question? How did you happen to go out to Kastenbaum to take a look at him at his home at 78 Sherman street?

A. Mr. Magwood asked me to.

Q. He asked you to do that?

A. Yes, sir.

Q. Did you ask him what he wanted you to do that for?

116 A. No, sir, I didn't.

Q. You didn't ask him—

A. No, sir.

Q. —what he wanted you to go down and look at the fellow for?

A. No, sir, I didn't ask him, I didn't.

Q. Did he tell you what he wanted you to go and look at him for?

A. Yes.

Q. What did he tell you?

A. Why, he said the man—why, I identified the horse down to headquarters.

Q. Now, wait. Did you go to look at Mr. Kastenbaum first or did you go and look at the horse first?

A. I went and seen the horse first.

Q. You saw the horse first?

A. Down at Henry street, yes, sir.

Q. Who asked you to go and look at the horse?

A. Mr. Magwood.

Q. Did he give you any reasons when he asked you to go and look at a horse in the Henry street barn?

A. No, sir, he didn't. He said they had arrested a horse and he says, "Now, you have been acquainted with horses all around and see if you know the horse."

Q. Did he say he arrested a horse?

A. He said the horse was arrested, that is the way.

Q. You are sure he told you that?

117 A. Why, yes, yes.

Q. And what did you tell him when he told you something like that?

A. I went down there and see the horse.

Q. That was arrested. Is that why you went down, to see the horse that was arrested?

A. Yes, yes.

Q. You didn't go down for the purpose of looking at him so that you could find out who the driver was, did you?

A. Why, I wanted to see the horse and I could pretty near tell if he belonged in the city.

Q. You could tell? You could claim that you could tell any horse, who the driver is of any horse you look at?

A. No, no, no, no, man, don't think I am some architect or some fortune teller or mind reader.

The Court: Just answer the questions, Witness.

Q. When you went there to see that horse did Mr. Magwood tell you what he wanted you to look at it for?

A. No, he didn't, no.

Q. What did he say when he talked to you again after you looked at the horse?

A. Well, that I don't just remember.

Q. He never talked to you again, did he, after he asked you to go and look at the horse?

A. Yes, sir, he did.

Q. When?

A. I used to see him in our office. I was working for Mr. 118 Nehrbas.

Q. He used to come over there and get into office talks?

A. Yes, sir.

Q. Mr. Magwood?

A. Yes, sir.

Q. You knew he was a Lehigh Valley detective?

A. Yes, sir.

Q. Did he promise you a job?

A. I don't have to have anything about a promise from a job.

Q. I asked you, did he promise you a job?

A. No, he didn't.

Q. What did he tell you out there in the slaughter works?

A. It isn't no slaughter works; it's a fertilizer.

Q. What did he tell you?

A. He said there was a big, white horse pinched down there at No. 1 Henry street barn and asked me to go down and see if I know the horse. I didn't think nothing if I went down and looked at the horse.

Q. After you looked at it what did you do then?

A. I don't just remember. I know I looked the horse over.

Q. What did you do after you looked at him? Did you go home?

A. Yes, I went home that day.

119 Q. And did you see Mr. Magwood that day?

A. No, I think I see him a day or two after. I wouldn't just say but it was some little time after that.

Q. Wasn't Mr. Magwood with you when you looked at the horse?

A. He was, yes, sir.

Q. Well, didn't you tell him right there anything that you knew about that horse?

A. Yes, I did.

Q. What did you tell him?

A. I told him that that horse looks like the one the wall-eyed fellow—the fellow was a wall-eyed Jew was driving.

Q. That is what you told Mr. Magwood?

A. Yes, sir.

Q. Then he gave you Mr. Kastenbaum's address 78 Sherman street?

A. A few days after and—

Q. Mr. Magwood gave you the address?

A. Yes.

Q. After he gave you the address didn't he ask you to go down and take a look at him?

A. Yes, sir, he did.

Q. Why did you go down to look at him if you knew who the fellow was driving the horse?

A. Why—

Q. You told Mr. Magwood you knew who was driving it?

Mr. Wheeler: He said a wall-eyed Jew.

A. That is what I said, yes.

120 Q. Why did you go down on Sherman street to take a look at him?

A. I was going to make sure.

Q. Mr. Magwood asked you to go down and take a look at him, did he not?

A. Yes, sir.

Q. Where did you tell Mr. Magwood you saw this wall-eyed Jew drive this horse?

A. I see him on the Elk street market; I see him around the streets. I don't say it was his horse, understand, but I seen him driving the horse.

Q. You have seen him with another horse too, haven't you?

A. I did not, no, sir, I didn't.

Q. You told Mr. Magwood, didn't you, Mr. Jones, that you wouldn't say it was his horse but that you thought you saw him driving it?

A. I know I seen him driving the horse.

Q. I say, you told Mr. Magwood you don't say it is his horse?

A. I say I don't know it is his horse but seen him driving.

Q. I say, you told Mr. Magwood the same thing?

A. I can't swear whose horse it is.

The Court: Did you tell that to Magwood, Witness? That is the question. He wants to know whether you told that to Magwood.

Q. The same thing you are telling now, did you tell that to Magwood at the time?

121 A. Why, yes.

Q. What is your business?

A. Horse trader and pig raiser and little farming.

Q. Fish trade?

A. I didn't say fish. I was in the business six or seven years, fish and fruit.

Q. You have been in different kinds of businesses, have you not?

A. Why, in the fish business—

Q. For the last ten or twelve years?

A. Well, I have been in the fish business, in the horse dealing, now I am raising a few pigs.

Q. Mr. Magwood used to come out to your place out there, Mr. Jones, where you were skinning a horse, out to Nehrbas's?

A. Yes, he come there several times a week to get cooked meat for his dogs, which he said was at their place, because he always had a little market basket about that long (illustrating) carrying.

Q. That is how you know him, that is how you got acquainted with Mr. Magwood?

A. Yes, sir.

Q. Did he tell you here was a chance for you to make a few dollars for taking up this witness job?

A. No, sir Mr. Magwood or you or no one else can get me to testify to a lie.

The Court: Just a minute. Witness, you will either answer his questions or we will know the reason why. When he asks you a question you answer and then stop.

122 Q. (Question read.)

A. No, sir.

The Court: Strike out the rest.

Q. Have you ever been convicted of any crime, Mr. Jones?

A. I told you I was.

Q. You told me?

A. Yes, sir.

Q. Today?

A. No, sir, the other time.

Q. What was it, do you remember?

A. I was charged up with bastardy, that is all.

Redirect examination.

By Mr. Wheeler:

Q. You are here under subpoena, Mr. Jones?

A. Yes, sir, I have it here if necessary to see it.

Mr. Wheeler: That is all.

JAMES MAGWOOD, was called as a Witness in behalf of the Defendant and having been duly Sworn testified on Direct Examination by Mr. Wheeler as follows:

Q. Where do you live, Mr. Magwood?

A. Geneva, N. Y.

Q. You are employed now by the Lehigh Valley Railroad Company?

A. Yes, sir.

Q. You were working with the railroad when it was under the United States Railroad Administration?

123 A. Yes, sir.

Q. And you were in charge of the Kestenbaum case back in 1918?

A. Yes, sir.

Q. You helped work that case up?

A. Yes, sir.

Q. You were assigned to the investigation of the facts in that case?

A. Yes, sir.

Q. You recall the accident in which the wagon of butter was spilled occurred in December 1917?

A. Yes, sir.

Q. Did you see the white horse down in Police Headquarters?

A. Yes, sir.

Q. Does the description given by the last witness adequately describe the horse?

A. Yes, sir.

Q. Did you make efforts, Mr. Magwood, after you saw the horse there, to ascertain who was the owner of that horse?

A. Yes, sir.

Q. Or who had driven it?

A. Yes, sir.

Q. Just tell the jury, if you will, what efforts you made to ascertain who the owner was.

A. Well, I went to the Crandall sales stables and learned that there were two white horses, or white mares, rather, were sold over to a man named Gladner and made inquiries that Gladner buys the horses for the Jew hucksters and disposed of them to them. Then with this information I went out to Nehrbas.

124 I told him—Mr. Nehrbas handles horses and I says, "The police has got a big, white mare. I want to identify the owner of this mare. Who can I get? Will you come up?" "Why," he says, "you go and get this man Jones. He is the best expert in this part of the country on horses." I goes and took him up. Mr. Jones looked at the horse. He says—I says. "Whose mare is that?" He says. "You can pick him out in a thousand," he says, "look at that neck, big neck, looks like a stallion." I says. "Who drove her?" "Well," he says, "a wall-eyed Jew huckster but I don't know his name, but" he says. "You can pick him out in a thousand." Being wall-eyed described the man to a "T." Then we went out to Jefferson street and Jones went to see and described the horse to a blacksmith there and from the blacksmith I understood he got a line where this here Kastenbaum lived—

Mr. Holender:

Q. You were not there at the time?

The Witness: I waited outside in the rig.

Mr. Holender: I ask you to strike it out.

The Court: Strike it out.

Q. You can just state what efforts you personally made.

A. Well, through Mr. Jones we got a line on the driver of the horse. We were trying to locate this man Kastenbaum. Then I went down and tried Elk street Market, interviewed Mr. Pendfold, that is, the man that is in business there, and one of 125 his men with reference, "Did you see a gray horse?" He referred me to his man, this man Bleich. I described the horse to Bleich and asked him if he would go up and look at it. He went up and he says. "Why, yes," he says, "Kastenbaum owns that horse." I says, "How do you know?" He says. "Why, I loaded his rig up two or three times a week and this horse is his very noticeable." and told me—described this here man, told me of one particular big wall-eyed, and he described the horse to a "T."

Q. Did you ever offer Bleich a job on the Lehigh?

A. Why wasn't this brought out? That has been brought out since the trial. It wasn't brought out in police court.

The Court: That is not the answer.

A. No, sir, never did in my life, no, sir.

Q. After you got that information, Mr. Magwood, did you at any time send Jones to Kastenbaum's house? Did you send Jones to Kastenbaum's house?

A. Well, we didn't know the house. We worked on that street

He got a line who lived on that street and we sent Jones out to make inquiries through other people to see if he could locate him, and in the meantime the two police officers and I stayed back and Jones came out and he says, "He is home now, he just came in now," he says, "you can pick him out in a thousand; I don't know 126 his name but he is a big wall-eyed fellow and you can pick him out across the street."

Q. That was before you sought his arrest, was it not?

A. Yes, sir.

— And after you got that information from Jones did you then go in with the police officers?

A. The police officers were there with us but took to the background and I was in the background. We sent Jones ahead to see if he could locate the man.

Q. Who was it that made the arrest?

A. Well, Flesh and Roche.

Q. Was a search made of his house then?

A. No, sir.

Q. Was he switched around and frisked around and searched?

A. No, sir. These two officers were very polite to him, just took him, says they wanted him to come along with them.

Q. What time of day was this arrest made?

A. Well, a little after four o'clock, I should judge between four and five. We were up to the station house at 5:30. The minutes show registered on the headquarter-blotter at 5:30.

Q. Did you go down to the police headquarters with him?

A. Yes, sir.

Q. And I don't suppose you stayed there that night?

127 A. No.

Q. So you don't know whether his wife was down there or not?

A. No, I couldn't say as to that, only I heard the next morning his wife was there next morning.

Q. Well, you can't testify to that unless you were there. At the time you were there, Mr. Magwood, did you honestly believe that this man was the man who was guilty of that crime?

A. From my investigation, certainly.

Cross-examination.

By Mr. Holender:

Q. That is, from sending Jones down to look at this fellow, that was the most thing that you relied on?

A. No, after the man from Penfold's. Mr. Bleich, positively identified the horse and told me who the owner was.

Q. You heard him testify here, didn't you?

A. Yes. Well, at his testimony at the police station or at police court before Judge Hartzell—

Q. When he got out of police court you had not told him this

was a criminal case, had you? You didn't tell him anything about what kind of a case this was?

A. Oh, no, he didn't ask me the question.

Q. He never asked you what kind of a case it was?

A. No. He was subpoenaed—

Q. Just answer that question.

128 A. No.

Q. Mr. Bleich never asked you what kind of a trial he was to be a witness for, did he?

A. No. I served the subpoena on him.

Q. Just answer yes or no.

A. No.

Q. He never asked you; you subpoenaed him and he came to police court?

A. Yes.

Q. He never asked you what kind of a trial he was to be a witness for, did he? He never asked you?

A. Oh, no, but I told him.

Q. Well, a little while ago you said you never told him.

A. Oh, no, you asked me if he never asked me that. No. I told him what the case was.

Q. A little while ago you stated—

A. I misunderstood you.

Q. You understand English pretty well?

A. Yes.

Q. How long have you been a police officer for the Lehigh Valley?

A. Eleven years.

Q. Before that what did you do?

A. Ten years New York Central, all over the system.

Q. You have been a detective all your life, haven't you?

A. Practically.

Q. And did you ever work up a case like you did this one before?

129 A. I have worked up a good many of them.

Q. Good many of them?

A. Yes, sir. And no black mark against me today.

Q. Mr. Magwood, do you remember how many times you adjourned this case so as to get some witnesses? Do you remember that? Have you a record here?

A. No adjournment, no.

Q. Of when you appeared in court and when you adjourned the case to?

A. We had to send hundreds of miles to get witnesses. That is what the adjournment was for, it was to get shippers.

Q. Have you got the records?

A. No, I guess Captain Whitton has got the records.

Q. Do you remember after one of the adjournments that you told me that if you couldn't convict this fellow you would swim the rapids?

A. No.

Q. Just answer that?

A. No.

Q. If you wouldn't convict that fellow you would swim the rapids?

A. No.

Q. You will swear under oath you never told me that?

A. Yes, I think I can.

Q. I must be mistaken, I suppose.

A. There must be some mistake somewhere.

130 Q. You and I had a case before that you were sore about?

A. What?

Q. You and I had a case before, some fellow had some stolen property?

A. Yes, sir.

Q. And you were pretty sore about that?

A. And if I could have gotten to the Judge he would have been convicted.

Q. Just put him on probation?

A. Yes, a man drove up with a load of——

Q. Just answer my question. Judge Laing put him on probation?

A. Yes, sir.

Q. And you told me in this case if you wouldn't convict this fellow you would swim the rapids?

A. No, I can't recall.

Q. You wouldn't say one way or the other would you?

A. No.

Q. Listen, you say after that first adjournment that you went over to this garage to see Mr. Frey, do you remember, this garage man around February 1st? Did you hear Mr. Frey testify here?

A. We had Frey there the first proceedings of the court, he was subcpnaea there, the evidence will show.

Q. Did you hear Mr. Frey testify here that you took him 131 to the Henry street barn February 1st and that he so testified in police court, do you remember that?

A. No, I think I couldn't hear him.

Q. What?

A. I didn't hear his testimony.

Q. Wasn't it a fact that you took Mr. Frey to the Henry street barn after the case was adjourned for the first time?

A. No, sir, no, sir; got a statement there from him, sworn statement there, you will see the date there; we have got it on record.

Mr. Wheeler: Have you that statement?

The Witness: I guess Captain Whitton has got it. We are prepared to show the date was wrote up. I think you got to the witness.

Q. You were working on this case a week over on Sherman street, were you not?

A. Yes, sir, we was on a good many streets.

Q. What made you walk over on Sherman street?

A. Well, from the information that Mr. Jones obtained. I didn't know where this man lived from last year's bird's nest.

Q. That is, you relied on Mr. Jones to tell you it was this fellow with this eye living on Sherman street?

A. He didn't say he knew where he lived until he got some information from this blacksmith, and he said, "Come on, we got him located but I don't know the number."

Q. Did you find out in the stockyards who bought that white horse?

132 A. Well, there were two white horses sold to a man named Gladner.

Q. Did he tell you where he lived?

A. No, only they gave the number, the numbers that was attached to the horses and the day they were sold and described one, a very notable big white mare.

Q. You found out that a man by the name of Gladner bought these horses?

A. Found out that he bought the horses for the hucksters.

Q. For the peddlers?

A. Yes, sir.

Q. Did you look up Mr. Gladner and find out if he sold a white horse to Mr. Kestenbaum?

A. No, sir, we couldn't locate him.

Q. Did you know he lived on Sherman street?

A. No, he made out in an assumed name.

Q. Did you look in the directory?

A. Yes.

Q. Did you look at a directory?

A. No, we had other people trying to locate him.

Q. Who did it for you? Who looked at the directory for you?

A. I couldn't say at the time because we was busy looking it up.

Q. I show you the testimony in police court: "Where was it bought?" "Bought at the stockyards June 11, 1917." It was bought at a private sale and bought by a man that buys horses for peddlers?

133 A. Yes.

Mr. Wheeler: What page is this?

Mr. Holender: Page 45.

Q. "Who is that man?" "The man's name is Gladner"?

A. Yes, sir.

Q. The horse was led to this man's address; is that what you found out, that the horse was led to Gladner's address?

A. That is what I testified.

Q. But you don't know whether that was so or not?

A. I didn't see it, no, only what information I got.

Q. "Who is the man? Who is Gladner, do you know?" "I don't know only I understand from the stockyards people that he buys horses for Jewish peddlers." Is that right? Is that what you testified to?

A. Well, it is there. It must be right.

The Court: Well, answer the question, Witness.

The Witness: Yes, sir.

Q. Now, Mr. Magwood, you didn't ask anybody on the market or in the stockyards if they knew where Gladner lived? You didn't ask anybody?

A. Yes, sir.

Q. Who did you ask?

A. I asked the president there, Mr. Tom Loughlin. He didn't know him, he says, only he come here, buys horses.

134 Q. Did you ask Jones if he knew where Gladner lived?

A. Yes, sir.

Q. He said what?

A. He didn't know.

Q. Gladner is a man that buys these horses for all these Jewish peddlers, he told you he doesn't know where he lives?

A. Yes, sir.

Q. Do you know that Gladner lives on Sherman street?

A. I couldn't say.

Q. How much did you pay Mr. Jones for the time he spent in this case?

A. How much? I couldn't say. I didn't pay him anything.

Redirect examination.

By Mr. Wheeler:

Q. Paid him his lost time?

A. Oh, his lost time, his day's pay, whatever it is.

Q. At the time the arrest was made did you call Kastenbaum a crook and swear at him, as he says you did?

A. No, sir, I was quiet and meek because I let the two headquarters men—wanted to give them an encouragement to make the arrest. I stepped to the door and never opened my mouth.

Recross-examination.

By Mr. Holender:

Q. You said you were quiet as a mouse?

A. Yes, sir.

135 Q. Let the other fellows make the arrest?

A. The other fellows, yes.

Q. Gave them the credit for it?

A. Well, what I mean, I didn't want to butt in there. There wasn't a word said by me.

Q. It was their case, wasn't it, that you let them arrest?

A. They were down as arresting on the blotter, yes.

Q. You were here this morning when Officers Roche and Flesh testified?

A. Yes, sir.

Q. Did you hear them say that you were the man that had charge of the case and made the arrest and they only went along with you to protect you?

A. Well, I guess they might have said that but——

Q. You heard them say it?

The Court: Did you hear them say that this morning?

The Witness: Well, I couldn't say. I sit there for quite a distance alone.

Q. That wasn't so, was it?

A. No, sir.

Q. I say, it wasn't so?

A. No, sir, that I had charge.

Q. You didn't take them along for protection?

A. No, sir, don't need no protection. Never had a black eye in my life and been in the business a good many years.

136 Q. Mr. Magwood, you took them along to point out the man that they were to arrest?

A. They worked on the case, understand, for, I guess, a month and I didn't want to pull anything over on them without having them know.

Q. They testified they didn't work on the case, they only went along with you to help?

A. That might be what they testified but the information what I received the police force did a month before I was assigned to the case, and the horse recovered.

Q. Now, Mr. Magwood, when you went down there you thought he was a burglar and had robbed a car?

A. No, sir.

Q. You didn't think so, did you?

A. No, sir. I know it—

Q. You didn't know whether he was or was not?

A. I know he had the stuff, according to the information I received. I knew positively he didn't rob the car because the stuff after—was gathered after it was thrown out of the car; it was robbed by younger fellows. I think.

Q. You don't know—you weren't there at that time—whether he was the fellow that broke into those cars or not?

A. No, but he was the man had the stuff, I was sure of that, from my investigation, got the stuff after it was stolen.

137 Q. Your investigation is based on Mr. Jones and Mr. Bleich, isn't that so, those two men you relied on?

A. From what information I received—

Q. From these two men?

A. They come around afterwards with another horse, after the horse disappeared to the market, after his gray horse disappeared.

Q. You relied on Mr. Jones and Mr. Bleich?

A. Yes, and other witnesses.

Q. What other witnesses?

A. People that I interviewed around the market.

Q. You didn't bring any other witnesses to the police court two and a half years ago except the ones you had here today? I say, you didn't have any others?

A. We had several witnesses.

Q. I say, the same ones you got here you had in police court? Don't you remember?

A. Well, we got witness here we didn't have in police court.

Q. Who have you got here that you didn't have in police court?

A. I know them by sight around here.

Q. You mean all those witnesses about proving the shipment of the merchandise?

A. Yes, they ain't here.

Q. I mean witnesses as to the horse. You have no different ones here than you had two years and a half ago?

138 A. No.

Q. So you don't agree with Mr. Flesh and Mr. Roche that you made the arrest and not they?

A. No, sir.

Q. And you didn't put your hands—

A. Oh, we made the arrest jointly, yes, the three of us there.

Q. The three of you made the arrest?

A. But they done the talking and he walked right out with them.

Q. So you want to change that, Mr. Magwood, to make it that the three of you arrested him?

A. Well, I was present, yes.

Q. A little while ago you said you were just as quiet as a mouse.

A. I didn't say a word to this Kastenbaum at all, didn't open my mouth at all. When he was taken to headquarters them two men goes down as the officers making the arrest and I was left out.

Mr. Holender: All right. That is all.

Mr. Wheeler: I want to read the testimony of the conductor of the train.

Mr. Holender: I have stipulated all that. Go ahead and read it all.

Mr. Wheeler: Well, I think this should be before the jury.

(Mr. Wheeler thereupon read the testimony of Bernard Blosser.)

139 ROBERT O. WHITTON was called as a Witness in behalf of the Defendant and having been duly Sworn testified on Direct Examination by Mr. Wheeler as follows:

Q. Captain, you are chief of the Lehigh Valley police?

A. Captain of police.

Q. You have charge of the police in this district?

A. Yes, sir.

Q. In December 1917, after this accident occurred, did you assign Officer Magwood to this case?

A. I did after the city police had made some efforts to locate the owner of the gray mare that they had found out here when a wagon was struck by a street car.

Q. Well, you say a gray mare. Did you see the mare at headquarters?

A. Yes. Well, I say gray; she was white.

Q. You have heard the previous description of the witnesses given of this horse?

A. Yes.

Q. Is that a fair and adequate description?

A. Yes, a very good description.

Mr. Holender: I object to that.

The Court: Well, to save a little time.

Mr. Holender: All right.

140 Q. Mr. Holender would like you to describe it, Captain?
A. Well, she was a gray mare—
Q. Gray or white?

Mr. Holender: He said Gray.

The Witness: Well, I have a habit of calling a white horse a gray, I guess, that is all. Weigh about twelve or thirteen hundred pounds, very blocky build, had a very large neck and the mare was notable on account of her neck; she had a much larger neck than you usually see with a mare, and a person would almost think from general appearances she was a stallion, very blocky, good looking mare. She was up in years, had heaves a little.

Q. You were not present, Captain, when the arrest was made?

A. No, I was not.

Q. You learned of that later?

A. Yes, sir.

Q. The next morning were you present in police court?

A. I was.

Q. Were you the man who swore to the information?

A. Yes, sir.

Q. Before the information was sworn to had the results of Officer Magwood's investigation been made known to you?

A. It had.

Q. Had he made it known to you?

A. Yes.

141 Q. And you were the man who swore to the information?

A. Yes, sir. I had also talked to Mr. Bleich and he was—said he was very positive that this was a mare that had been driven by Kastenbaum.

Mr. Holender: Just a minute. I object to that, contradicting his own witness.

Mr. Wheeler: I think it is competent, showing his motive in swearing out the warrant.

The Court: I think so. Objection overruled.

Q. Just repeat that, Mr. Whitton?

A. I had talked to Mr. Bleich and we had obtained a statement from him and he was very positive that this was the mare that had been driven on the market by Kastenbaum and he said he had loaded Kastenbaum's rig two and three times a week.

Q. Did you have any talk with Jones, or was that with Magwood?

A. No, I didn't see Jones before the arrest.

Q. Who was the man in City Court who had charge of the issuing of warrants where informations are sworn out?

A. Mr. Flannigan.

Q. And did you go to him when you sought to lay this information?

A. I did.

Q. And for what crime did you seek to lay it?

A. I asked to lay the information for burglary, larceny and criminally receiving stolen property.

142 Q. The information was not wrote for criminally receiving stolen property?

A. No, sir.

Q. Will you tell the jury why it was not laid for that crime?

A. For the reason that Mr. Flannigan objected to it, said we couldn't convict on both crimes. I said we wanted it that way for the reason that if the evidence did not show burglary and larceny that I felt sure we had sufficient evidence to show that criminally receiving stolen property.

Cross-examination.

By Mr. Holender:

Q. Mr. Whitton, you put Mr. Magwood in charge of this case, didn't you?

A. Yes, I asked him to—

Q. I say, you put Mr. Magwood in charge of this case?

A. Not in complete charge, no. I asked him to go out and make an investigation.

Q. That is, all his acts were performed on behalf of the Lehigh Valley Railroad Company?

Mr. Wheeler: Not the company.

Q. At that time?

Mr. Wheeler: Administration.

A. Well, I assume that they were, yes.

Q. Do you remember whether the Lehigh Valley was under Federal control at that time?

A. I believe it was.

Q. You are not sure, though, are you?

143 A. I am not sure, no. I don't just recall the date they were taken over.

Q. Well, you made out this information, you say property of the Lehigh Valley Railroad Company?

A. Yes, sir.

Mr. Wheeler: Do you know whether it was under Federal—It was. All the railroads were under Federal control on the 31st of December 1917, taken over by the Government at that time.

Q. You were acting for the Administration in trying to trace the people who burglarized this car?

A. Yes, sir.

Q. And Mr. Magwood was there acting under your instructions?

A. Yes, sir.

Q. For and on behalf of this Administration?

A. Yes, sir.

Q. You say Mr. Flannigan was the one that made out this information for you?

A. No, I didn't say that; I said he was the man in charge; there was some other man sitting in there helping him write informations and this other man—I don't know who he was—

Q. What did you tell him you wanted it for, burglary third and grand larceny first and receiving stolen property?

A. I told him I wanted to lay an information for burglary third degree, grand larceny and criminally receiving stolen property.

144 Q. What information did you have of burglary that Mr. Kastenbaum broke into and robbed this car at that time?

A. Only this: that goods—I had reasons to believe that the goods were in his possession when the wagon was struck—

Q. Just a moment, I didn't ask you that.

A. You asked me for my reason, I am trying to tell you.

Q. Do you know what burglary is?

A. Yes.

Q. What is it?

A. Why, it is breaking and entering a car.

Q. Did you have any information at that time that Mr. Kastenbaum broke and entered this car? Yes or no.

A. No, but you asked me for my—

Q. Just a minute. Mr. Magwood told you that he had no proof that this man Kastenbaum broke and entered a car, did he not?

A. No, he didn't.

Q. Mr. Magwood didn't tell you that?

A. No, sir.

Q. Did he lead you to believe that he did have information that he broke and entered the car?

A. He did not.

Q. Well, which was it? Did he tell you or did he not?

A. Neither. You asked me my reason and I tried to tell you but you stopped me. I will tell you my reason for laying that—

145 Q. Just a minute. I don't want any reasons, Mr. Whitton. Just answer these few questions.

A. All right.

Q. You charge now that Mr. Flannigan, the man in charge of the warrants in City Court, led you into error, is that right?

A. He refused to enter in the information what I asked.

Q. Let me ask you, Mr. Whitton, why did you need an information if you arrested a man, the man was arrested the night before by Mr. Magwood, say, for instance? Why did you want an information?

A. Because the City Courts require it.

Q. You knew you didn't need it, didn't you?

A. City Courts require it.

Q. That is your reason?

A. Yes, sir, that was my reason for laying the information the next morning.

Q. At the time that you swore to it charging Mr. Kastenbaum with breaking and entering the car, you had no information which pointed to the fact that Mr. Kastenbaum was the man that broke and entered the car?

A. I had reasons to believe it.

Q. That broke and entered? I asked you if you had reasons to believe that he broke and entered the car?

A. Yes, I had reasons to believe that.

Q. What was that reason? The fact that somebody told you it was found on his wagon?

146 A. Yes, sir.

Q. And from that—a short time after it was stolen?

A. Yes.

Q. And from that you assumed that he was the fellow that broke into the car?

A. Yes, sir.

Q. Did Mr. Magwood ever tell you that he promised Mr. Bleich a job as a railroad detective?

A. No, sir, never heard of it until I came into this court.

Q. Mr. Whitton, did Mr. Magwood ever tell you that he asked Jones to go and look at this horse and sent him down to 78 Sherman street to look at the man?

A. He did.

Q. Have you ever known Jones before?

A. Never knew him until the other trial.

Q. You laid this information on Mr. Magwood's say-so?

A. That and some statements we had.

Q. How long have you been in this business that you are in now?

A. Twelve years.

Q. You have laid a great many informations, have you not?

A. Yes, a good many.

Q. You know Mr. Flannigan was a lawyer, you knew that?

A. Yes.

147 Mr. Wheeler: You claim this information is for burglary?

Mr. Holender: Burglary third and larceny.

Mr. Wheeler: Where is the "burglary third"?

The Court: It is a combination, isn't it?

Mr. Wheeler: Grand larceny first degree is a separate definition. I think the facts here come squarely within it.

The Court: I mean your information is for both.

Mr. Wheeler: It is, yes.

Redirect examination.

By Mr. Wheeler:

Q. I ask you, Captain Whitton, if you had reason to honestly believe that the plaintiff here Samuel Kastenbaum, the defendant

in the City Court action, was guilty of the crime of grand larceny in the first degree, which is defined as:

"A person is guilty of grand larceny in the first degree who steals or unlawfully obtains or appropriates in any manner specified in this article property of any value by taking the same from the person of another in the night time, or property of the value of more than \$25 by taking the same in the night time from any dwelling house, vessel or railway car, or property of the value of more than \$50 in any manner whatever?"

148 A. Yes, sir.

Q. Did you have reason to believe that the acts which have been related to you fitted that crime?

A. I did.

Mr. Holender: Just a moment. I object to that on the ground that Mr. Wheeler asked me to elect or forced the Court to pass on the question of whether it is a false arrest action and good faith is no defense to a false arrest action.

Mr. Wheeler: Oh, he is wrong.

The Court: I did not suppose good faith did enter into false imprisonment, does it, Mr. Wheeler?

Mr. Wheeler: I understand it does, yes, sir. I call your Honor's attention to the case Schultz against Greenwood Cemetery. 190 N. Y. 276. Possibly my question *as* incorrectly worded. Mr. Holender's objection may go to that. I might ask the officer if he had reasonable grounds to believe that the acts which had been related to him fitted this definition of grand larceny. Perhaps the word "good faith" is not correct; if that is what your Honor has in mind, I understand the law is the defendant in actions brought for false arrest has the burden of proving, as I conceive, that it had reasonable grounds to believe and had probable cause for believing that the crime had been committed by the person who is charged with it.

149 The Court: That is as I understand it.

Mr. Wheeler: Well, then I will modify my question, perhaps obviate this objection of Mr. Holender.

Q. Did you consider that you had reasonable grounds for believing, did you consider that you had probable cause for believing that Samuel Kastenbaum was guilty of the crime of grand larceny in the first degree when you laid that information?

Mr. Holender: I just want to insert my objection to that.

The Court: Just make your objection.

Mr. Holender: Incompetent, irrelevant and immaterial.

The Court: It seems to me the same question plus a question of good faith on his part which I did not understand was material on false arrest. You are asking whether he had good faith or not.

Mr. Wheeler: I am asking him if he had reasonable grounds to believe.

The Court: Isn't it for the jury to determine?

Mr. Wheeler: Perhaps the reasonableness of it. I will modify my question once more and ask him this way:

Q. Did you believe, Captain, at the time that you laid this information, that the man was guilty of the crime as defined in the section that I have read you pertaining to grand larceny in the first degree?

150 A. Yes, sir.

Recross-examination.

By Mr. Holender:

Q. When you laid this information you knew he had already been arrested?

A. Yes.

Q. And he was also in court that morning, was he not?

A. He was in court after the information was laid, yes.

Q. You kept him over in the station until you got your information?

A. I didn't keep him. I didn't know where he was.

Q. The officers kept him until you got the information?

A. I don't know. I assume that they did.

Q. So they at your instruction kept him until you went over to City Court and got this information?

A. No, no, the man had been arrested.

Q. Give us the reason for that procedure, please.

A. What?

Q. About this information. Where was Mr. Kastenbaum all the time that you got this information?

A. I don't know. I told you I was told that he had been arrested.

Q. When you laid the information. Who told you, Mr. Magwood?

151 A. Yes.

Q. Told you that he was arrested the night before?

A. Yes.

Q. Then you laid this information?

A. Yes, sir.

Q. And then they brought him over to court?

A. Well, I don't know. I didn't see him until he appeared in court.

Q. That was about noon, wasn't it?

A. I believe ten o'clock. I don't recall exactly.

Q. Well, why make it ten o'clock? Why not twelve o'clock?

A. That is the time court opens. I can't recall.—

Q. You want to get it down early in the morning?

A. No, I didn't care what time it was.

Mr. Holender: That is all.

Mr. Wheeler: That is all. Defendant rests.

Defendant rests.

PEARL KASTENBAUM, was called as a Witness in behalf of the Plaintiff and having been duly Sworn testified on Direct Examination by Mr. Holender as follows:

Q. You are the wife of Mr. Sam Kastenbaum who sits here?

A. Yes, sir.

152 Q. Do you remember the time that Mr. Kastenbaum was arrested?

A. Yes, sir.

Q. Do you know the date? Do you happen to know when it was?

A. No, I don't remember just the date.

Q. Well, were you home when he got arrested?

A. No, I was not home.

Q. Did you go to the police station, the police headquarters, that night at nine o'clock?

A. No, sir.

Q. And have a talk with Mr. Kastenbaum?

A. No, sir.

Q. Did you know where he was that night?

A. I didn't know, no.

Q. What time did you first find out what became of your husband?

A. One o'clock in the morning.

Q. And how did you find that out?

A. He called me up.

Q. Mr. Kastenbaum called you up?

A. Yes, sir.

Q. Where were you when he called you up?

I was up to my sister's and the landlady came to tell me that I got a call from my husband because I got sick that time.

Q. That was the first time, one o'clock in the morning, that you found out what became of your husband?

A. Yes, sir.

153 Q. The police never notified you?

A. No.

Q. And the next day is when you came to court and got a lawyer for your husband?

A. Yes, sir.

Q. And he had him bailed out?

A. Yes, sir.

Q. Did your husband ever have a white horse?

A. I knew him since I am married I never seen him with a white horse, never.

Q. How long have you been married?

A. That is the fifth year.

Q. That was soon after he came to Buffalo that you were married?

A. Right after he came to Buffalo.

Q. How many horses did you ever know him to have?

A. Two.

Q. Was either one ever a white horse?

A. Never a white horse.

Q. Do you know Mr. Gladner, Emil Gladner?

A. Yes, sir.

Q. Where does he live?

A. 111 Sherman.

Q. Do you know where he lived in January 1919 and in December 1917?

A. On the same number.

Q. How many years now have you known Mr. Gladner to live on Sherman street?

A. Seven years.

Q. You know him and his family?

154 A. Yes, sir.

Q. He has always lived on Sherman street?

A. Yes, sir.

Q. That is near your place, near 78?

A. Yes, sir.

Q. His number is 110?

A. 111—No, 110, that is right.

Q. 110?

A. Yes, sir.

Q. You have known him to live there for seven years?

A. Yes, sir.

Q. Is he in court here?

A. I beg your pardon, he didn't live there all the time; he used to live on 78 and then he removed on 110.

Q. Sherman street?

A. Yes.

Q. But he always lived on Sherman street?

A. Always on Sherman.

Q. Is he here in court, can you see?

A. No, he isn't here.

Mr. Holender: That is all.

HARRY EVANS, was called as a Witness in behalf of the Plaintiff and having been duly Sworn testified on Direct Examination by Mr. Holender as follows:

The Witness: 14 Tremont place.

Q. Mr. Evans, how long have you lived in Buffalo?

T. Thirty-five years.

155 Q. And about how many years of that time did you live in East Buffalo?

A. Well—

The Court: Just ask him that question, we will get along.

Q. Do you know Emil Gladner?

A. I do, yes, sir.

Q. Where does he live, do you know? On 617 what street?

A. On Emslie street, I think.

- Q. What street?
A. On Emslie street.
Q. I ask you if you are sure?
A. Yes, I know him.
Q. You know Emil Gladner?
A. I know him personally, yes, sir.
Q. How long have you known him around East Buffalo?
A. About ten years or more.

Cross-examination.

By Mr. Wheeler:

- Q. You think he lives on Emslie street?
A. Somewhere around that neighborhood, yes, sir.

Redirect examination.

By Mr. Holender:

- Q. Around East Buffalo?
A. Yes, sir.

Mr. Holender: That is our case.

156 Evidence closed.

Mr. Wheeler: If the Court please, defendant renews its motion for a non-suit and now moves for the direction of a verdict upon the following grounds; first, upon the ground that the plaintiff has failed to make out a cause of action; second, upon the ground that the defendant has now proved and the proof is uncontradicted that in making the arrest the arrest was made in good faith and without evil design, which, under the ruling of the Court of Appeals, is an adequate defense to an action for false arrest. The action as far as malicious prosecution is concerned has been dismissed by your Honor. I call your attention to the case, Schultz against Greenwood Cemetery where Judge O'Brien said:

"An action against an officer for false arrest and detention, known as an action for false imprisonment, may be justified by proof that a crime was committed and that he had reasonable ground to suspect that the person arrested was the offender, the arrest being made in good faith and without evil design."

The Court: That meant, therefore, to include a lack of probable cause.

Mr. Wheeler: Yes.

The Court: Deny the motion.

157 Mr. Wheeler: Take an exception upon each ground. The Court: So that you may be governed in your summing up. I understand that the good faith in a false imprisonment action is that in the nature of a defense but not alone, that you must, in addition to that, show want of probable cause.

Mr. Wheeler: He must show want of probable cause. We must simply show it was made in good faith and the facts justified us.

The Court: No, I think the burden is upon you, Mr. Wheeler to show both good faith and probable cause.

Mr. Wheeler: Upon my exception to the previous motion saves my point.

The Court: I will qualify that by saying it is not necessary for you to show both; if you show probable cause that is an absolute defense, but if you simply show good faith that is not an entire defense.

Mr. Wheeler: There must be either probable cause or good faith or good faith evidenced by a belief in facts which show probable cause that the crime was committed by the plaintiff.

The Court: That is a better way to express it.

Mr. Wheeler: Well, I think we all agree upon the law and there isn't any difficulty upon that, simply upon applying the facts.

158 Mr. Wheeler for the Defendant summed up the case, followed by Mr. Holender for the Plaintiff, after which the Court charged the Jury as follows:

Charge of the Court.

Gentlemen of the Jury, this action is brought by Samuel Kastenbaum against the Director General of Railroads. As it comes to you it is an action for false imprisonment.

It is the claim of the plaintiff in this action that he was arrested through the instigation of the defendant, that he was innocent at the time, and he claims certain aggravation regarding that arrest and imprisonment. He claims that he was taken from his home at night and locked up all night long in a cell in one of the police stations or headquarters of the City of Buffalo and that the next morning, as is customary with persons charged with felony, his picture was taken for the so-called "Rogues' Gallery" and finger prints and imprints were taken, that he was later taken to the City Court somewhere about eleven o'clock, where he was released upon bail, and that his case from that time on was adjourned from time to time and until such time as a hearing was had in City Court and he was discharged. He claims that the defendant is responsible for his arrest, through its agents, and particularly through the police officers of the defendant.

159 I charge you, gentlemen, that his discharge in this case is *prima facie* evidence of his innocence. That is, some testimony has come here as to whether or not the Court properly discharged him. But the fact that he has been discharged in that court is, with regard to that trial over there, *prima facie* evidence that he was innocent.

It is the defendant's claim, gentlemen, in this case, that it made no move without having reasonable and probable cause to believe that the plaintiff had committed the crime with which the defendant charged him. It claims that there was no aggravation and there

was no searching of his premises, no searching of the man out at the house, and that he was simply taken in the ordinary course which is followed when a man is arrested charged with a felony. It is further the contention of the defendant, gentlemen, in the argument of Counsel here that the plaintiff was guilty of this offense.

The burden is upon the plaintiff, gentlemen, in this case to establish all elements of the plaintiff's case by a fair preponderance of the evidence. In other words, the plaintiff has come into this court, asking for relief, and before relief can be granted to the plaintiff against the defendant the plaintiff must establish the elements of his case by a fair preponderance of the evidence.

We come down, gentlemen, to the question of whether or not a crime was committed. The evidence shows undisputedly upon this trial that a certain crime was committed here in the City of

160 Buffalo some time on the night of December 20, 1917, not

perhaps in Buffalo but just outside the City Line, that while a certain railroad train of this Lehigh Valley Railroad was passing that given point somewhere near Buffalo, one of the cars was broken open and certain property belonging to some shipper upon that railroad was stolen. It seems to be undisputed that some of that shipment, consisting of some tubs of butter, being driven down Main street in this city upon that night or early the following morning, came into collision with a trolley car. Then we come down to the question of the dispute and the only fact in this case for you to determine, whether or not from the circumstances of the case, that crime having been committed, the defendant had reasonable and probable cause to believe that the plaintiff in this action was the one who did commit that crime.

The crime charged, gentlemen, in addition to larceny first degree, was burglary in the third degree. And the distinction between the two is that larceny is the stealing of property of certain amounts while burglary is the breaking into and entering of property. And I charge you that the evidence is undisputed in this case that there was the crime of larceny in the first degree committed and also the crime of burglary committed. So then we are starting out from

161 that point on, that crime having been committed, to determine whether or not the defendant had reasonable grounds to be-

lieve that this particular plaintiff was the one who had committed that crime. If, gentlemen, the defendant had probable cause to believe that the plaintiff was guilty of a felony, then the plaintiff cannot recover. The defendant had a right to make or cause the arrest if, under the circumstances, a reasonable man would believe that there were reasonable grounds for believing the plaintiff was guilty.

You should understand, gentlemen, how serious a situation arises in cases of this kind. Not every man who is guilty has a cause of action in court. The rights of society must be protected and police officers must be able to go out and use reasonable judgment in making arrests. If every time any innocent man was arrested the person causing the arrest was liable in damage society would not be

of course, protected. But, as you will find if you get to the fundamental principles of our laws, serious consideration has been given to just this situation, and the law says that you or I are justified in causing a man's arrest if we have reasonable grounds to believe him guilty. In other words, though we may humiliate, disgrace and shame an absolutely innocent man, still if we had reasonable grounds to believe that he was guilty, the laws and the requirements of society will protect us in our action.

In determining the question, gentlemen, of reasonable and probable cause, belief and good faith are, of course, elements 162 tending toward such reasonable and probable cause. But good faith, gentlemen, is not, however, the test. In other words, though I may have perfect good faith in making an arrest yet the courts have said that if I have no reasonable grounds then I am liable. So that we come to the real test in this case, as I have said before, which is whether or not the defendant had reasonable and probable cause or grounds for its belief that the plaintiff was guilty of this crime charged.

This evidence has all been placed before you today and I am not going to rehearse the question as to the color of the horse and the description of the horse and all the evidence. You are to place yourselves, gentlemen, in the position of the police officers in this case and say whether or not from what they knew they had reasonable grounds or you would have reasonable grounds for believing that the plaintiff was guilty of this crime which concededly had been committed.

If you believe, gentlemen, that the plaintiff has established his side of the case by a fair preponderance of the evidence and is entitled to damages from the defendant, then you come to the question of damages. The plaintiff has testified he was never before arrested for any crime, that he lives with his wife and family in the City of Buffalo and has been here for some years. As to the actual money which he claims he lost by reason of what he claims was the wrongful act of the defendant, he lost seven or eight 163 days' work at eight or ten dollars a day. He was compelled to pay or did pay his attorney the sum of \$105.00 for services and expenses rendered in the trial in City Court. Those, gentlemen, are actual money damages which he has testified to here and they should be taken into consideration by you if you determine that the plaintiff should recover from the defendant. In addition to that sum, gentlemen, there is another element of damage which comes into a case of this kind which is not measured by exact dollars-and-cents but it is left for you to determine, if you believe that the plaintiff should recover, what sum will fully and fairly compensate him, not only for the suffering which he endured by reason of being imprisoned over night and locked in a cell, but what he may have suffered by reason of humiliation and disgrace to his family by reason of having been arrested and charged with this serious offense.

As I say, gentlemen, you are to take this evidence as it has been presented to you and determine by that test, placing yourself in the

position of the defendant, whether or not the defendant's officers had reasonable grounds to believe that the plaintiff was guilty. If you believe, gentlemen, from the evidence here, as reasonable men sitting upon the jury, that the plaintiff was guilty then certainly they had reasonable grounds, but even if you do not believe that the plaintiff was guilty, if you believe that at the time they 164 made that arrest, the connection of the plaintiff with the ownership of this white horse, the testimony of Mr. Bleich and Mr. Jones, and what they told these officers, if the officers had reasonable and probable grounds to believe that the plaintiff had committed this crime or been connected with it in such a way as to be guilty, not only perhaps of the burglary, but either of the burglary or the larceny, then the plaintiff cannot recover. On the other hand, if you believe that he was innocent or that the defendant did not have reasonable and probable grounds to believe that he was guilty, then he is entitled to recover such damages at your hands as you believe that he has suffered.

Any requests?

Mr. Wheeler: I simply desire to except to that portion of your Honor's charge wherein you stated that the plaintiff might recover as damages any injuries or any damages suffered by way of humiliation or disgrace to his family, which I think was the language your Honor used.

The Court: Well, I will modify that by saying humiliation or disgrace to himself or his wife. I think that proof came in. I think, Mr. Wheeler, it is perfectly proper, after looking it up, humiliation. That does not mean to his family but to himself by reason of his having a family. Of course, he is not entitled to any damages which his family suffered I did not intend to so state.

Mr. Wheeler: Or his wife.

165 The Court: Or his wife either. But the fact that he has a family was simply brought to your attention to show his station in life.

Mr. Wheeler: And just to ask your Honor to charge in the language of the Court of Appeals, I request your Honor to charge that if the defendant or if its officers who were its agents had reasonable ground to suspect that the person arrested was the offender, the arrest being made in good faith and without evil design, then the plaintiff cannot recover.

The Court: I so charge.

Mr. Holender: If your Honor please, I respectfully except to that portion of your Honor's charge in which you say that the jury should put themselves in the position of the defendant and determine whether or not they had reasonable grounds for causing the arrest and all that you said in that connection. And I ask your Honor to charge the jury—

The Court: Just a minute. I said that in determining the question or I intended to say that in determining the question of probable cause the jury should place themselves in that position and then ask themselves as reasonable men whether or not the defendant—

Mr. Holender: That is what I want to ask your Honor, the question is not what they would do if they were the company but whether or not the acts were the acts of reasonably prudent men.

166 The Court: Certainly. I did not intend to charge any other way, Mr. Holender.

Thereupon, at 4.30 o'clock P. M., the jury retired to deliberate, returning into the court room Tuesday morning, October 12, 1920, at 10 o'clock with a sealed verdict in favor of the plaintiff in the sum of \$500.00.

167 *Affidavit of No Oppinion.*

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,
against

THE DIRECTOR GENERAL OF RAILROADS, Defendant.

STATE OF NEW YORK,
County of Erie, ss:

Thomas R. Wheeler, being duly sworn, deposes and says that he is a member of the firm of Kenefick, Cooke, Mitchell & Bass, attorneys for the defendant in the above entitled action, and has charge of the action for said attorneys; that no opinion was written herein by the Justice before whom the action was tried, as deponent is informed and verily believes.

THOMAS R. WHEELER.

Sworn to before me this 25th day of February 1921.

WILLIAM C. WARREN, JR.,
Notary Public in and for Erie Co., N. Y.

168 *Order.*

The foregoing case and exceptions, containing all the evidence given and proceedings had upon the trial of this action, are hereby settled and signed by the undersigned, the Justice before whom this action was tried, and his order filed in the Clerk of the County of Erie as a part of the record in this action.

Dated, March 10th 1921.

ALONZO G. HINKLEY,
Justice Supreme Court.

169

Stipulation Waiving Certification.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,
against

THE DIRECTOR GENERAL OF RAILROADS, Defendant.

It is hereby stipulated by and between the attorney for the respective parties herein that the foregoing papers, viz: notices of appeal from judgment and order, summons, complaint, answer amended complaint, answer to amended complaint, stipulation of facts, clerk's minutes, judgment, order denying motion for a new trial under section 999 of the Code of Civil Procedure, case and exceptions, order settling case, affidavit of no opinion, and true transcripts and copies of the originals thereof entered and remaining on file in the office of the Clerk of the County of Erie and together with the original exhibits used on the trial of the case may be used upon the argument of the appeal herein with the same force and effect as if certified by the clerk of said county, the certification of the same being hereby expressly waived.

170 Dated, March 3rd, 1921.

HOLENDER & HOLENDER,
Attorney- for Plaintiff.
KENEFICK, COOKE, MITCHELL &
BASS,
Attorneys for Defendant.

171

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the First Day of July, 1921.

Present:

Hon. Frederick W. Kruse,
Presiding Justice.Hon. Irving G. Hubbs,
Hon. William W. Clark,
Hon. Rowland L. Davis,
Associate Judges.

SAMUEL KASTENBAUM, Respondent,

vs.

DIRECTOR GENERAL OF RAILROADS, Appellant.

The above named Director General of Railroads, defendant in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Erie on the 16th day of October, 1920, and from an order denying defendant's motion for a new trial, entered in said Clerk's Office on the 172 same day, and the said appeal having been argued by Mr. Thomas R. Wheeler, of counsel for the appellant, and by Mr. Israel G. Holender, of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered that the judgment and order so appealed from be, and the same hereby are, affirmed, with costs.

All concur.

NEWELL C. FULTON,

Clerk.

Enter:

FREDERICK W. KRUSE.

Entered 1st day of July, 1921.

173 Supreme Court, Appellate Division, Fourth Judicial Department.

Clerk's Office, Rochester, N. Y.

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court, in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order made by said court upon the appeal in the within entitled action and the whole thereof, and that the original case and papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the City of Rochester, N. Y., this first day of July, 1921.

[SEAL.]

NEWELL C. FULTON,

Clerk.

174

Judgment of Affirmance.

Supreme Court, Erie County.

SAMUEL KASTENBAUM, Plaintiff,

vs.

DIRECTOR GENERAL OF RAILROADS, Defendant.

The above named defendant, Director General of Railroads, having appealed from a judgment herein entered in the Erie County Clerk's Office on the 16th day of October, 1920, in favor of the plaintiff, Samuel Kastenbaum, in the sum of \$605.75, to the Appellate Division, Fourth Department, and also from an order denying the defendant's motion for a new trial, entered herein in the Erie County Clerk's Office on the same day, and said appeal from said judgment and order having been duly heard and said Appellate Division having ordered that said judgment and order be affirmed, with costs, and said costs having been duly taxed in the sum of \$114.00, upon due notice.

Now, on motion of Holender & Holender, attorneys for the plaintiff, Samuel Kastenbaum, it is

175 Adjudged that said judgment and order so appealed from be, and the same hereby is, in all respects, affirmed, with costs to the plaintiff, Samuel Kastenbaum, and that the said plaintiff recover of the defendant \$114.00 costs, and have execution against the defendant therefor.

Judgment signed this 12th day of July, 1921.

W. F. SCHOHL,
Deputy Clerk.

176

Order Granting Reargument of Appeal.

At a Term of the Appelate Division of the Supreme Court in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 27th day of September, 1921.

Present:

Hon. Frederick W. Kruse,
Presiding Justice.

Hon. John S. Lambert,
Hon. Irving G. Hubbs,
Hon. William W. Clark,
Hon. Rowland L. Davis,
Associate Justices.

SAMUEL KASTENBAUM, Respondent,

vs.

DIRECTOR GENERAL OF RAILROADS, Appellant.

The above named Director-General of Railroads, appellant herein, having, on the 27th day of September, 1921, duly moved before this Court for an order granting a reargument of the appeal herein, the appeal having been affirmed by order of this Court entered the 1st day of July, 1921.

Now, upon reading and filing the affidavit of Thomas R.
177 Wheeler, verified the 1st day of September, 1921, the notice
of said motion and proof of due service thereof upon the
attorneys for the respondent, and upon all the proceedings heretofore
had and taken herein, and after hearing Mr. Thomas R.
Wheeler, of counsel for appellant, in favor of the motion, and Mr.
Israel G. Holender, of counsel for respondent, in opposition thereto,
and after due deliberation had thereon,

It is hereby ordered, That the said motion be, and the same hereby
is, granted, and a reargument of the appeal herein is hereby or-
dered, to be heard at the November, 1921, term of this Court.

NEWELL C. FULTON,
Clerk.

Enter.

FREDERICK W. KRUSE.

Entered 5th day of October, 1921.

178 Supreme Court, Appellate Division, Fourth Judicial
Department.

Clerk's Office, Rochester, N. Y.

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 5th day of October, 1921.

[SEAL.]

NEWELL C. FULTON,
Clerk.

179

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 15th Day of November, 1921.

Present:

Hon. Frederick W. Kruse,
Presiding Justice.

Hon. John S. Lambert,
Hon. Irving G. Hubbs,
Hon. William W. Clark,
Hon. Rowland L. Davis,
Associate Justices

SAMUEL KASTENBAUM, Respondent,

vs.

DIRECTOR GENERAL OF RAILROADS, Appellant.

This Court having, on the 1st day of July, 1921, made and entered an order affirming the judgment and order appealed from herein, and having thereafter and on the 5th day of October, 1921, granted the defendant's motion for a reargument of said appeal, and 180 the Court having heard Mr. Thomas R. Wheeler, of counsel for appellant, and Mr. Israel G. Holender, of counsel for respondent upon such reargument, and due deliberation having been had thereon,

It is hereby ordered, that the judgment and order so appealed from be, and the same hereby are, affirmed with costs. All concur.

NEWELL C. FULTON,
Clerk.

Enter.

FREDERICK W. KRUSE.

Entered 30th day of November, 1921.

181 Supreme Court, Appellate Division, Fourth Judicial Department.

Clerk's Office, Rochester, N. Y.

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 30th day of November, 1921.

[SEAL.]

NEWELL C. FULTON,
Clerk.

182 *Order Denying Motion for Leave to Appeal to the Court of Appeals.*

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 3rd Day of January, 1922.

Present:

Hon. Frederick W. Kruse,
Presiding Justice.

Hon. Irving G. Hubbs,
Hon. William W. Clark,
Hon. Rowland L. Davis,
Hon. Charles B. Sears,
Associate Justice.

SAMUEL KASTENBAUM, Respondent,

vs.

DIRECTOR GENERAL OF RAILROADS, Appellant.

The above named Director-General of Railroads, appellant herein, having, on the 3rd day of January, 1922, duly moved before this Court for an order granting to him leave to appeal to the Court of Appeals from the judgment of affirmance entered upon the 183 order of affirmance heretofore and on the 30th day of November, 1921, duly made and entered herein by this Court,

Now, after reading and filing the affidavit of Thomas R. Wheeler, verified the 23rd day of December, 1921, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, and upon all the proceedings heretofore had and taken herein, after hearing Mr. Thomas R. Wheeler of Counsel for appellant, in favor of said motion, and Mr. Israel G. Holender, Counsel for respondent, in opposition thereto, and due deliberation having been had thereon.

It is hereby ordered that the said motion be, and the same hereby is, denied, with ten dollars costs.

HERBERT E. WAIT,
Clerk.

Enter.

FREDERICK W. KRUSE.

Entered 11th day of January, 1922.

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184 Supreme Court, Appellate Division, Fourth Judicial Department.

Clerk's Office, Rochester, N. Y.

I, Herbert E. Wait, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 11th day of January, 1922.

[SEAL.]

HERBERT E. WAIT,
Clerk.

185 *Order Denying Appellant's Motion for Leave to Appeal to the Court of Appeals.*

STATE OF NEW YORK:

In Court of Appeals.

At a Court of Appeals for the State of New York Held at Court of Appeals Hall, in the City of Albany, on the Third Day of February, A. D. 1922.

Present: Frank H. Hiscock, Chief Judge, presiding.

SAMUEL KASTENBAUM, Respondent,

vs.

DIRECTOR GENERAL OF RAILROADS, Appellant.

A Motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

186 Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A Copy.

[SEAL.]

WM. J. ARMSTRONG,
Deputy Clerk.

187 STATE OF NEW YORK,
County of Erie, ss:

I, A. R. Atkinson, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being

Courts of Record, do hereby certify that I have compared the annexed copy of Record on Appeal with the original thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Buffalo, this 21st day of April, 1922.

No. 22150.

[Seal of Clerk's Office for the County of Erie, N. Y.]

A. R. ATKINSON,
Clerk.

188 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court, Appellate Division, Fourth Department, of the State of New York, Greeting:

Being informed that there is now pending before you a suit in which Director General of Railroads is appellant, and Samuel Kastenbaum is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the Supreme Court, Erie County, State of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme
189 Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,897. Supreme Court of the United States. No. 942, October Term, 1921. Director General of Railroads vs. Samuel Kastenbaum. Writ of Certiorari.

190 Supreme Court, Appellate Division, Fourth Department.

SAMUEL KASTENBAUM, Plaintiff-Respondent,
against

DIRECTOR GENERAL OF RAILROADS, Defendant-Appellant.

Supreme Court, Appellate Division, Fourth Judicial Department, et al.

Clerk's Office, Rochester, N. Y.

I, Herbert E. Wait, Clerk of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by the Clerk of the County of Erie for filing in the Supreme Court of the United States, was pursuant to stipulation of the attorneys for the respective parties herein satisfactory as and for the return to the writ of certiorari herein, that said record heretofore filed in the Supreme Court of the United States and heretofore certified by the Clerk of the County of Erie contains if properly so certified all the papers used upon the trial of this case in the Supreme Court of Erie County, and upon the argument of the appeal in this Court, which said papers properly remain on file in the office of said Clerk of Erie County who is also the clerk of the Supreme Court Erie County, New York.

In pursuance of the foregoing writ of certiorari, I now hereby certify that on the 10th day of June, 1922, there was filed in my 191 office, a stipulation in the above case, a copy of which duly certified by me is hereunto attached.

[Seal of Supreme Court, Appellate Division, Fourth Department.]

HERBERT E. WAIT,
Clerk.

Dated: June 19", 1922.

192 Supreme Court, Appellate Division, Fourth Judicial Department.

Clerk's Office, Rochester, N. Y.

I, Herbert E. Wait, Clerk of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, do hereby certify that the within is a true copy of a stipulation filed in this office on the 10th day of June, 1922, in the case of Samuel Kastenbaum against Director-General of Railroads, and of the whole thereof.

In witness whereof I have hereunto set my hand and affixed the

seal of said Court at the City of Rochester, New York, this 10th day of June, 1922.

[Seal of Supreme Court, Appellate Division, Fourth Department.]

HERBERT E. WAIT, Clerk.

193 Supreme Court, Appellate Division, Fourth Department.

SAMUEL KASTENBAUM, Plaintiff-Respondent,
against

DIRECTOR GENERAL OF RAILROADS, Defendant-Appellant.

Whereas, the Supreme Court of the United States has heretofore granted the petition of the defendant-appellant for a writ of certiorari to review the record in the above entitled cause, and under date of May 27, 1922, issued its writ directing the above Court to send to it the record and proceedings in the above cause, the certified copy of which record and proceedings have heretofore been lodged in said Court by the defendant-appellant:

Now, therefore, it is hereby stipulated by and between the attorneys for the respective parties herein that said certified copy of the record in the above entitled cause heretofore filed in the Supreme Court of the United States by the defendant-appellant as a part of its petition for a writ of certiorari may be taken as the return to the writ of certiorari issued by the Supreme Court of the United States, and that when this stipulation may have been filed with the clerk of the Supreme Court, Appellate Division, Fourth Department, a certified copy thereof may be forwarded by him to the Clerk of the Supreme Court of the United States as his return to the writ of certiorari issued out of the

194 Supreme Court of the United States on the 27th day of May 1922.

Dated, June 6th, 1922.

HOLENDER & HOLENDER,
Attorneys for Plaintiff-Respondent.
KENEFICK, COOKE, MITCHELL &
BASS,
Attorneys for Defendant-Appellant.

[Endorsed:] Supreme Court, Appellate Division, Fourth Department. Samuel Kastenbaum, Plaintiff-Respondent, vs. Director General of Railroads, Defendant-Appellant. Original. Stipulation and Affidavit. Kenefick, Cooke, Mitchell & Bass, Attorneys for Def't App'l't., Office and Post-office Address, Marine Trust Building, 237 Main Street, Buffalo, N. Y.

195 [Endorsed:] File No. 28,897. Supreme Court U. S., October Term, 1922. Term No. 374. Director General of Railroads, Petitioner, vs. Samuel Kastenbaum. Writ of certiorari and return. Filed June 26, 1922.

374
No. 842

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WM. R. STANS
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF RAILROADS,
Petitioner.

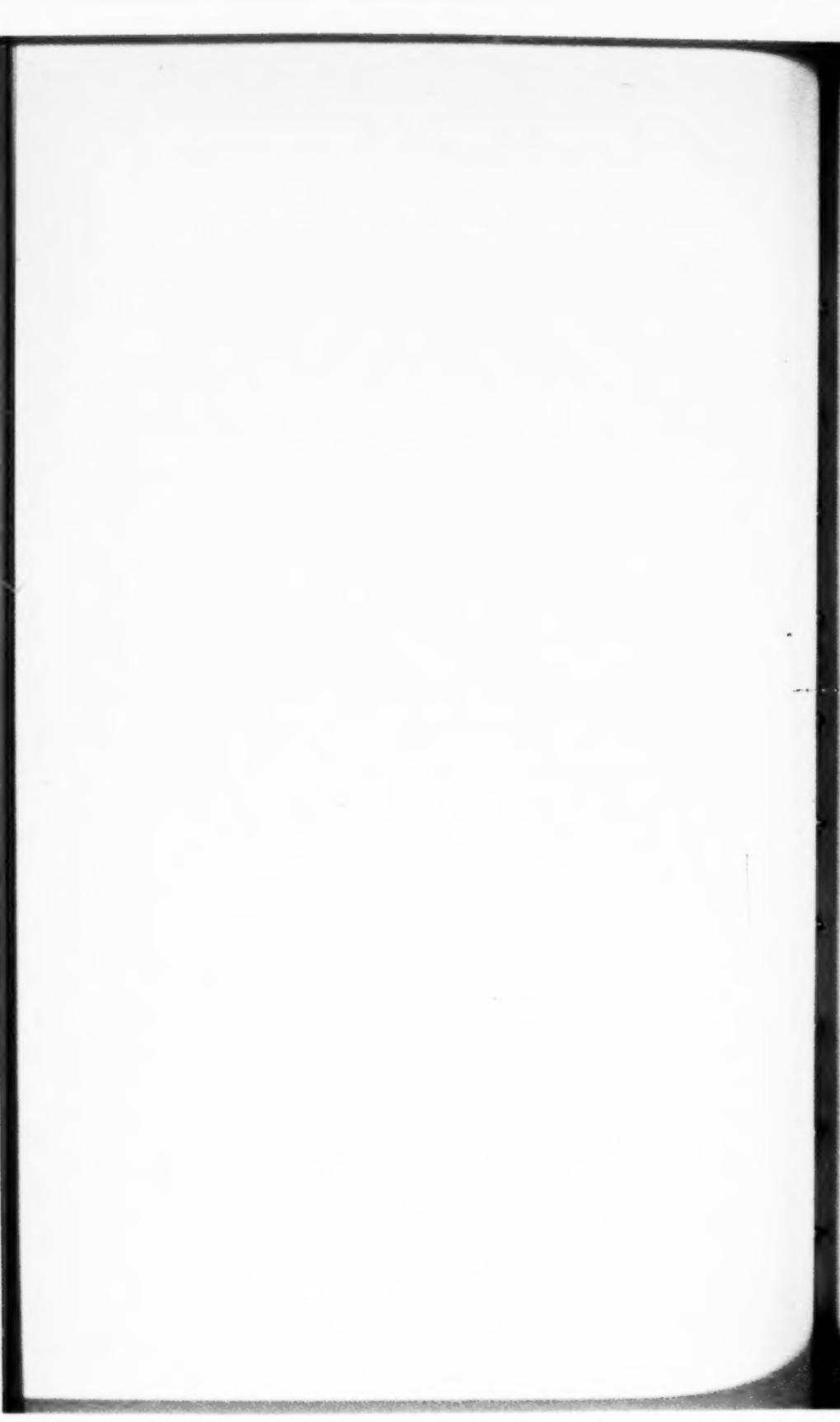
against

SAMUEL KASTENBAUM,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW YORK, AND BRIEF
IN SUPPORT OF PETITION.**

LYMAN M. BASS, ESQ.,
Attorney for Petitioner,
Director General of Railroads.

LYMAN M. BASS, ESQ.,
THOMAS R. WHEELER, ESQ.,
Of Counsel.



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IN THE
Supreme Court of the United States
OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF
RAILROADS,
Petitioner,
AGAINST
SAMUEL KASTENBAUM,
Respondent.

PETITION FOR WRIT OF CERTIORARI

*To the Honorable .The Supreme Court of the
United States:*

Your petitioner, Director General of Railroads, deeming himself aggrieved by a certain decree or order of the Supreme Court of the State of New York, entered in the case of Samuel Kastenbaum against Director General of Railroads, which decree or order became final for the purposes of review in this court on the 3rd day of February, A. D. 1922, prays this Honorable Court to issue its writ of certiorari as authorized so to do by the provisions of the Act of Congress approved September 6, 1921, (U. S. Revised Statutes, §709) ad-

dressed to the said Supreme Court of the State of New York commanding it to certify and transmit to this court, on a day therein named, a full and complete transcript of the record and all proceedings had in the various courts of the State of New York in said cause, in so far as the same appear of record or on file in said Supreme Court of the State of New York, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that petitioner may have such relief and remedy in the premises as this Court may deem appropriate, and justice and right may require.

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The matters involved and the facts and circumstances are as follows:

1. The respondent, Samuel Kastenbaum, on or about the 17th day of August, 1918, commenced this action by the service of a summons and complaint upon the Lehigh Valley Railroad Company (fol. 16-51). Thereafter and on or about the 3rd day of May, 1920, an amended complaint in which the Director General of Railroads was named as defendant was served upon the attorneys for the defendant. (Fol. 72-107). The plaintiff alleged in the amended complaint that during the period of federal control of the railroads (Fol. 78-79) the plaintiff was arrested by an agent of the defendant and that the arrest was false, wanton, malicious and without probable cause (fol. 85) and

further alleged that upon a hearing in the City Court of Buffalo, he was discharged. Fol. 97-98.

2. The complaint stated causes of action both for malicious prosecution and for false arrest. The cause of action for malicious prosecution was dismissed by the Trial Court at the close of the plaintiff's case. (Fol. 287) The defendant's motion to dismiss the cause of action for false arrest was denied by the Trial Court (fol 289) and likewise a motion to dismiss the plaintiff's complaint at the close of the entire case was also denied. (Fol. 619) while the complaint charged the filing of an information upon which the respondent was arrested (fol. 79-83), the undisputed evidence was that no warrant had been issued at the time the respondent was taken in custody. Fol. 577-578, 178-179) The action was treated by the court and counsel as an action for false arrest.

3. A charge of grand larceny, third degree, was laid against the respondent on the ground that he had stolen and taken away a quantity of butter valued at One thousand Dollars, contained in a freight car of the Lehigh Valley Railroad, and it was further alleged that the property had been appropriated to the use of respondent. (Fol. 80-83).

4. The Director General of Railroads contend~~d~~ *inter alia* in the lower court that his agent was justified in making the arrest in that he had probable cause to believe that the respondent had com-

mitted the crime. No such question as that is before this Court. The single question involved upon this application for a writ of certiori and upon the appeal is the question whether an action of this character is maintainable against the Director General of Railroads, which point was preserved by an appropriate exception upon the trial.

5. On the trial of the action on the 11th day of October, 1920, before the Hon. Alonzo G. Hinkley and a jury, the Trial Court(over this petitioner's objection and exception) refused to dismiss the complaint, and judgment was rendered against the defendant in the sum of Five hundred Dollars. (Fol. 140-143)

6. From the judgment entered on this verdict and the order denying a new trial, this petitioner appealed to the Appellate Division of the Supreme Court. Fourth Department, of the State of New York, which court unanimously affirmed the judgment appealed from. (Fol. 680-698). Thereafter this petitioner applied for a re-argument of the appeal and such reargument was granted. (Fol. 700-706). Thereafter, the Appellate Division after having heard the re-argument, ordered an affirmation of the judgment of the lower court. (Fol. 712-722). This petitioner thereafter applied to the said Appellate Division for leave to appeal to the Court of Appeals of the State of New York, but such application was denied by the Appellate Division. (Fol. 724-731). Thereafter this petitioner applied to the Court of Appeals for leave

to appeal to that court, but such application was denied by the Court of Appeals. (Fol. 736-739).

II.

The single question and proposition involved in this appeal is substantially as follows:

1. Does an action for false arrest lie against petitioner, an officer of the United States Government, and is such a cause of action included within the provisions of section 10 of the Act providing for the Federal Control of Carriers? (40 United States Statutes 451, Chap. 25, Act of Mch 21, 1918)

The petitioner upon its motion for the direction of a verdict moved for a dismissal upon the ground that the plaintiff had failed to make out a cause of action and specifically argued the particular question herein submitted in the Appellate Division and before the Court of Appeals.

III.

Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons, among others:

1. Because it was error for the courts of the State of New York to hold that a cause of action for false arrest is maintainable against the Director General of Railroads, an officer of the United States Government.

2. Because this Court has recently held that in an action of a similar nature such a cause of action does not lie. (*Missouri Pacific R. R. Co. vs. Ault*, Adv. Sheets, U. S. Supreme Court, July 1, 1921, P. 647, 256 U. S. 41 S. C. R. 593) Reference is hereinafter made to this case in the brief attached to this petition.

IV.

That the judgment of affirmance complained of was entered in the Erie County Clerk's office on the 12th day of July, 1921 (fol. 697) and became final thereafter by the order of the Court of Appeals denying the application of petitioner for leave to appeal to that court, entered on the 3rd day of February, 1922;

That your petitioner, as required by law, has exhausted every possibility of redress before filing an application for the granting or issuance of a writ of certiorari herein and being without other means for the redress of his grievances, the petitioner presents his petition for a writ of certiorari accompanied by a complete and fully certified transcript of the entire record of all proceedings had in this cause, together with a brief of his argument upon the questions of law involved.

WHEREFORE, Your petitioner respectfully prays that this Honorable Court grant a writ of certiorari in this case to the Supreme Court of the State of New York and cause the record in this

case to be brought to this Honorable Court for final review and determination.

DIRECTOR GENERAL OF RAILROADS,

By LYMAN M. BASS,
Attorney for Petitioner,
Director General of Railroads.

LYMAN M. BASS, Esq.,
THOMAS R. WHEELER, Esq.,
, of Counsel.

IN THE
Supreme Court of the United States
OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF RAILROADS,
Petitioner,
AGAINST } No.
SAMUEL KASTENBAUM,
Respondent. }

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

STATEMENT OF FACTS.

The essential facts involved upon this application have been referred to in the petition. Samuel Kastenbaum was arrested by an Agent of the Director General of Railroads and was charged with the crimes of burglary and larceny. No warrant had been issued for his arrest. Upon the hearing in the City Court of Buffalo, he was discharged. (Fol. 184-185). The Director General of Railroads believed that he was justified in making the arrest on account of the facts involved but since the only question before this court is in regard to the right to institute an action of this sort against an officer of the United States Government, it is unnecessary to review the facts at this time.

The complaint charged the filing of an information upon which Kastenbaum was arrested (fol. 78.83), but the undisputed evidence was that no warrant had been issued at the time Kastenbaum was taken into custody. (Fols. 577, 578. Fols. 178, 179). The cause of action asserted by the plaintiff for malicious prosecution was dismissed by the Trial Court at the close of plaintiffs case. (Fol. 287) The defendant's motion to dismiss the cause of action for false arrest was denied by the Trial Court. (Fol. 289) The action as submitted to the jury was treated by the court and counsel as an action for false arrest, and application for this writ is made upon the theory that an action of such a character will not lie.

POINT I.

The Courts of the State of New York erroneously held that an action for false arrest would lie against the Director General of Railroads an officer of the United States; such a cause of action is not included within the provisions of Section 10 of the Act providing for the federal control of carriers.

The complaint alleges two causes of action, one for malicious prosecution and one for false arrest. It is true that at the close of plaintiff's case ,the cause of action for malicious prosecution was dismissed. (Fols. 284, 289) The trial Court, however, submitted the cause of action for false ar-

rest to the jury (fols. 620-627) notwithstanding the motion made by the counsel for defendant at the close of the plaintiff's case and at the close of the whole case for a dismissal.

After the first argument of this case in the Appellate Division, and on the first of June, 1921, the United States Supreme Court handed down its decision in the case of *Missouri Pacific R. Co. v. Ault*. This is reported in the Advance Sheets, United States Supreme Court, July 1, 1921, at page 647. In the *Ault* case both the railroad corporation and the Director General of Railroads were sued for a penalty under a statute of the State of Arkansas for non-payment of the wages of an employee within a certain period of days after his discharge. The judgment against the corporation was dismissed upon the ground that after the assumption of federal control of the carrier the railroad corporation could not be held responsible for any acts of the employees of the road. In considering the question of the liability of the Director General the Supreme Court, in its opinion at page 651, said:

"The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute, is rested specifically upon the clause in §10, to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers whether arising under state or Federal laws or at common law' and the provisions in §15 that the 'lawful police regulations of the sev-

eral states' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, *arising out of the operation of the railroad*, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed."

(Italics are ours.)

Judgment for the plaintiff was reversed.

In the case of *Pearl Dougherty v. Payne as Director General of Railroads*, decided by the United States District Court in the Southern District of Florida, the opinion of Judge Call reads as follows

"This cause comes on for hearing upon the motion for leave to file an amended declaration.

Heretofore on May 27th, inst., a demurrer was sustained to the declaration.

The 5th ground of the demurrer raised the question whether an action for malicious prosecution could be brought against the Director General of Railroads, as such officer, for the actions of one of the employees of a

railroad system under his control. A careful study of the Acts of Congress covering the Governmental control of transportation system seems to me to answer this question in the negative. Such being my view no purpose would be served in granting the motion to amend and it will therefore be denied."

This decision was handed down June 9, 1921, and, as we are informed, the action was brought for the malicious prosecution of a linen counter employed by the Pullman Car Lines at Jacksonville, Fla., her arrest was procured at the instance of employees of the Pullman lines. She was acquitted by a jury and brought suit for malicious prosecution.

In the case of *Hines vs. Bowling*, 272 Fed. Rep. 230, suit was instituted to recover for damages for malicious prosecution. The question involved in this case was referred to by Judge Boyd in his opinion, but was not passed upon. Judge Boyd stated:

"The question which arises is whether or not, under such circumstances, malice or wrongful motive can be imputed to the Chief Executive, who was performing an official function, or to the Director General, his alter ego, and made the ground of damages at the instance of an individual in a suit against the latter. However, this proposition was not relied upon, nor argued by defendant's counsel, and we do not deem it necessary to pass upon it in order to dispose of the case."

In *State vs. Hines*, Agent, 228 S. W. Rep. 667, the Court of Civil Appeals of Texas held that an action for penalties did not lie against the Director General of Railroads for failure to keep well lighted the water-closets and adjacent depot grounds maintained at several passenger stations of a Railroad taken over by the Director General of Railroads. The statutes of the State of Texas imposed a penalty for failure to keep these places lighted.

We respectfully submit the principle of these decisions applies to this case. It is true that the action as submitted to the jury was one for false arrest and not for malicious prosecution. It is likewise true that the action is not strictly one for a fine nor for a penalty. Nevertheless, those actions which are authorized to be brought against the Director General are defined expressly in Section 10 of the Federal Control Act as follows:

“That carriers while under Federal control shall be subject to all loss and liabilities as *common carriers*, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.”

It is apparent that the liability created against the Director General is a liability as a *common Carrier*, peculiar to common carriers, and very clearly it was intended to cover actions for personal injuries for negligence. The Director General is an officer of the United States. The Sov-

ereign Government, by the act, consents to suits being instituted against it in certain definite classes of cases. It cannot be thought that the Sovereign Government would consent to be sued in a class of cases such as actions for malicious prosecution or false arrest, where there was an element of moral wrong upon its part.

False arrest or false imprisonment, has been defined as follows in Addison on Torts, page 552;

"False imprisonment has been well defined to be a trespass committed by one man against the person of another by *unlawfully* arresting him and detaining him without any legal authority."

In *New York P. & N. R. Co. v. Waldron*, (82 Atl. 709) the action was defined as follows:

"'False imprisonment' is a wrong akin to that of assault and battery, and consists of imposing, by force or threats, unlawful restraint on a person's freedom of locomotion. It is the unlawful detention of a person against his will."

In *Schultz v. Greenwood Cemetery*, (190 N. Y. 776), the Court of Appeals said, referring to an action for false arrest:

"The action is in the nature of a trespass for a direct wrong or illegal act, in which the officer and defendant must have personally participated by direct act or indirect procurement."

We respectfully submit that within the authority of the *Ault* case, hereinafter set forth, it will not be presumed that the Government of the United States consented by the Federal Control Act to be sued in actions embracing an element of wrong or illegality upon the part of the Sovereign.

FINALLY

Your Petitioner urges:

1. That the Courts of the State of New York have erred in their decision holding that a cause of action for false arrest lies against petitioner, and
2. That the questions submitted were sufficiently raised on the trial in the courts below, and
3. That the decision of this Honorable Court in the *Ault* case supports your petitioner's contention.

WHEREFORE, it is respectfully submitted that a writ of certiorari should be issued as prayed for and that the errors complained of should be corrected by reversing the present order and judgment of the Supreme Court of the State of New York.

LYMAN M. BASS,
Attorney for Petitioner,
Director General of Railroads.

LYMAN M. BASS, Esq.,
THOMAS R. WHEELER, Esq.,
Of Counsel.

To

HOLENDER & HOLENDER,
Attorneys for Respondent,
Buffalo, N. Y.

PLEASE TAKE NOTICE that the foregoing petition for a writ of certiorari and brief in support thereof will be submitted to the Supreme Court of the United States on Monday, May 1, 1922, at 12 o'clock noon, or as soon thereafter as counsel can be heard.

LYMAN M. BASS,
Attorney for Petitioner,
Director General of Railroads.

LYMAN M. BASS, Esq.,
THOMAS R. WHEELER, Esq.,
Of Counsel.

Service of a copy of the above notice, petition and brief is acknowledged this day of April, 1922.

Attorney for Respondent.

Office Supreme Court, D.

FILED

JUN 1 1922

R. STANSBUR

CLERK

No. 54237

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF RAILROADS,
Petitioner.

against

SAMUEL KASTENBAUM,
Respondent.

MEMORANDUM IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW YORK

Clark H. Hammond
HOLENDER & HOLENDER,
Attorneys for Respondent,
Buffalo, N. Y.

ISRAEL G. HOLENDER,
Of Counsel.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

DIRECTOR GENERAL OF
RAILROADS,
Petitioner,
against
SAMUEL KASTENBAUM,
Respondent.

STATEMENT

On January 23, 1918, respondent was arrested, by the agents of the Lehigh Valley Railroad Company, and charged with pilfering a freight car. He was exonerated at a preliminary hearing. A Supreme Court jury verdict of five hundred dollars, in favor of respondent and against the Director General, as damages for the unwarranted arrest, was unanimously affirmed by the Appellate Division on July 1, 1921.

Appellant's motion for a reargument of the appeal was granted by said Appellate Division on Oct. 5, 1921.

The reargument was heard on November 17, 1921, and on November 30, 1921, said Appellate Division again unanimously affirmed the judgment of the trial court and the order denying a new trial.

Appellant applied to said Appellate Division for leave to appeal to the Court of Appeals and on January 3, 1922, defendants motion was denied, all judges concurring.

Thereafter petitioner applied to the Court of Appeals for leave to appeal to that court, but such application was denied by the Court of Appeals.

POINT I

Section 10 of the Federal Control Act provides that No Defense shall be made upon the ground that the carrier is an instrumentality or agency of the Federal Government. It was not intended by this legislation either to extinguish or impair vested rights of action or to authorize the President or his agents so to do.

Respondent was arrested January 23, 1918.

The false arrest action was instituted on August 17, 1918.

The "Lehigh Valley Railroad Company" was named as defendant.

An answer was interposed on behalf of the company, which alleged, in part, as follows:

"That heretofore the said Director General of Railroads issued a general order known as Order No. 50, which was dated October 28,

1918, and which provided, among other things, that actions at law arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads should be brought against William G. McAdoo, Director General of Railroads, and not otherwise; and further providing that pleadings in all actions of law pending at the time said order was issued against any carrier company for a cause of action arising since December 31, 1917, based on a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the said Director General of Railroads for the carrier company as party defendant, and dismissing the company therefrom, to all the provisions of which said order No. 50 reference hereby is made as though set forth in full.

"That thereafter said order No. 50 was amended by general order No. 50-A, which said order contained the same provisions as order 50 hereinabove referred to, but directed that hereafter actions of the character hereinabove referred to should be brought against "Director General of Railroads" and not otherwise, reference to said order No. 50-A being hereby made as though herein set in full."

Respondent, thereafter, served an amended complaint, substituting the "Director General of Railroads," as defendant, in place and stead of the "Lehigh Valley Railroad Company."

An answer to the amended complaint was then interposed on behalf of the Director General.

Act of March 21, 1918 (Federal Control Act) Chapter 25, Sec. 10, reads, in part, as follows:

"Carriers while under Federal Control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; *and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.*"

In *Moore & Co. v. A. T. & S. F. R. Co.*, 106 Misc. 59, the head note, reads, in part, as follows:

"The provision of section 10 of said act of Congress, which declares that 'Carriers while under Federal control shall be subject to all laws and liabilities as common carriers * * * except in so far as may be inconsistent with

5

the provisions of this Act or any other Act applicable to such Federal control or with any order of the President', must be construed to be wholly prospective in its operation and to affect only liabilities arising after said act took effect; it was not intended by this legislation either to extinguish or impair vested rights of action or to authorize the President or his agent or agents so to do."

POINT II

A false arrest action is clearly within the purview of the provisions of Section 10 of the Federal Act.

Appellant's memorandum, in support of the motion for a reargument in the Appellate Division, reads, in part, as follows: (pp. 9-10) :

"It is apparent that the liability created against the Director General is a liability as a common carrier, peculiar to common carriers, and very clearly it was intended to cover actions for personal injuries for negligence."

General Order 50, issued by the Director General of Railroads, October 28, 1918, provided, in part, as follows:

"It is therefore ordered that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based

on contract, binding upon the Director General of Railroads, claim for death or *injury to person*, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for Federal Control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, *that this order shall not apply to actions, suits or proceeding for the recovery of fines, penalties, and forfeitures.*"

The provisions of the foregoing order specifically allow an action to be brought for "injury to person."

"'A personal injury' includes * * * an assault, battery, *false imprisonment* * * * "

N. Y. Code of Civil Pro. Sec. 3343, s-d 9).

The *Ault* case, cited by appellant, pertains to fines and penalties, and is not applicable to actions for the recovery of compensation.

The opinion of the Court, in the *Ault* case, reads, in part, as follows:

"The government undertook, as carrier, to observe all existing laws; it undertook to compensate any person injured through a departure of its agents or servants from their

duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to permit any other sovereignty to punish it. * * *

"The purpose for which the government permitted itself to be sued was for compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier, while under Federal Control."

Fiero on Torts, under the head of "Compensatory Damages", states:

"Indemnity may be given for injury to reputation, feelings health, mind, and person, caused by the arrest, together with the expenses of the defense."

The verdict in this case was rendered to compensate respondent for the loss of time, legal expenses, etc., occasioned by his unwarranted arrest.

POINT III

The petition for a writ of certiorari should be dismissed, and the order and judgment of the Supreme Court of the State of New York affirmed.

Respectfully submitted,
Clark H. Hammond
~~HOLENDER & HOLENDER,~~

Attorney for Respondent,

Office and P. O. Address,

~~738 Prudential Bldg., Erie~~

ISRAEL G. HOLENDER,

Buffalo, N. Y.

of Counsel.

Service of a copy the within memorandum is acknowledged this day of April, 1922.

Attorney for Petitioner.

MAR 2 1923

WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1922.

No.  39

DIRECTOR GENERAL OF RAILROADS,
Petitioner,

against

SAMUEL KASTENBAUM.

On Writ of Certiorari to the Supreme Court
of the State of New York.

BRIEF FOR PETITIONER

LYMAN M. BASS, ESQ.,
Attorney for Petitioner,
Director General of Railroads.

LYMAN M. BASS, Esq.,
THOMAS R. WHEELER, Esq.,
Of Counsel.

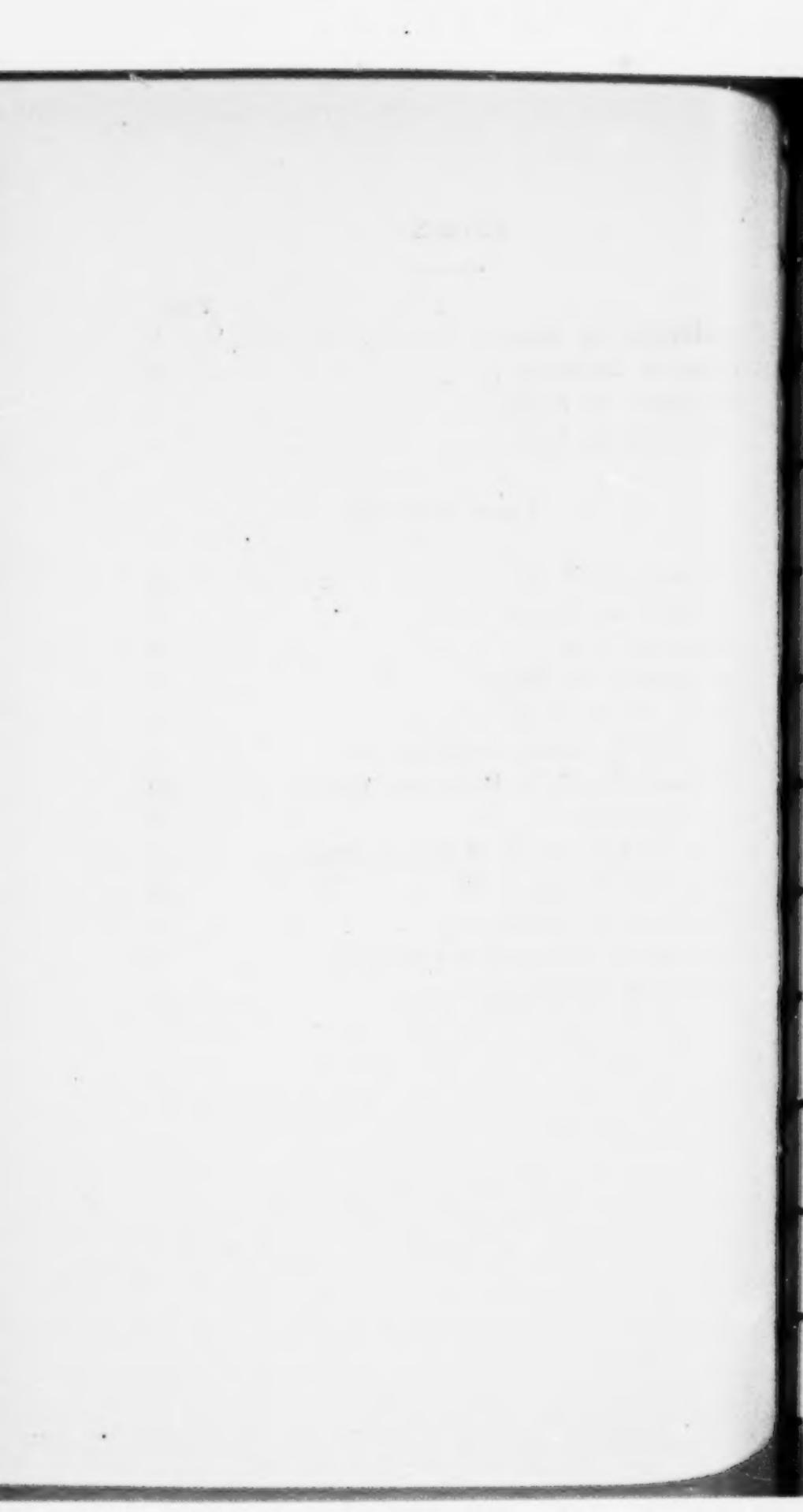


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1922.

DIRECTOR GENERAL OF
RAILROADS,
Petitioner, } No. 374.
against }
SAMUEL KASTENBAUM.

**On Writ of Certiorari to the Supreme Court
of the State of New York.**

BRIEF FOR PETITIONER.

Statement of Case.

This case comes here on a writ of certiorari issued by this court on the 27th day of May, 1922, (Transcript, page 93, Fols. 188-189) to review the judgment of the Supreme Court of the State of New York, entered in the Clerk's office of Erie County, N. Y., on the 12th day of July, 1921. (Transcript, pages 88-89.)

The action was tried in the New York State Supreme Court, Erie County, on the 11th day of

October, 1920, and resulted in a verdict in favor of the respondent, Samuel Kastenbaum, (plaintiff below) in the sum of Five Hundred Dollars (\$500). (Transcript, page 85.) From the judgment entered thereon and the order denying a new trial, the defendant appealed to the Appellate Division of the Supreme Court, Fourth Judicial Department where the judgment of the lower court was affirmed. (Transcript, pages 86-87; Fols. 171-173.) Judgment of affirmance was thereupon entered in the Erie County Clerk's office on the 12th day of July, 1921, (Transcript, p. 88) but an order was thereafter granted by the Appellate Division for the reargument of the appeal. (Transcript, pages 88-9.) Thereafter and on the 15th day of November, 1921, after said reargument had been had in the said Appellate Division, the judgment and order was affirmed. (Transcript, page 90.) In accordance with the practice of the State of New York, an application was thereafter made for leave to appeal to the Court of Appeals, which application was denied by the said Appellate Division. (Transcript, page 91.) An application was then made on behalf of the petitioner herein to the Court of Appeals directly for leave to appeal to the Court of Appeals, but said application was denied by said Court of Appeals. (Transcript, pages 92-93.) An application was then made to this court for a writ of certiorari on the 29th day of April, 1922, and the writ was granted as hereinabove pointed

out by this court on the 26th day of May, 1922, (Transcript, page 93) and the return to said writ was filed on June 26, 1922.

Question Involved.

The single question involved upon this appeal may be stated as follows:

Does an action for false arrest lie against petitioner, an officer of the United States Government, and is such a cause of action included within the provisions of section 10 of the Act providing for Federal Control of Carriers? (40 U. S. Stat. 451. Chap. 25, Act of March 21, 1918).

Statement of Facts.

The respondent, Samuel Kastenbaum, on or about the 12th day of August, 1918, commenced this action, by the service of a summons and complaint, against the Lehigh Valley Railroad Company. (Transcript, pages 3-7). The said defendant interposed an answer in the form of a general denial asserting *inter alia* that the said Lehigh Valley Railroad was at the time in the control of the Director General of Railroads. (Transcript, pages 7-9). Thereafter, the plaintiff filed an amended complaint in which the defendant named was the Director General of Railroads. (Transcript, pages 9-13). The defendant, Director General of Railroads, thereupon served an an-

swer to the said amended complaint, which is in the form of a general denial with the exception of certain admitted facts. (Transcript, pages 4-15).

The plaintiff alleged in his amended complaint that during the period of Federal Control of the railroads, he was arrested by an agent of the defendant and that the arrest was false, wanton and malicious and without probable cause. (Transcript, pages 10-11; Fols. 20-23). He further alleged that upon a hearing in the City Court of Buffalo he was discharged. (Transcript, page 12; Fols. 24-25). His discharge was admitted upon the trial.

The complaint stated causes of action both for malicious prosecution and for false arrest. The cause of action for malicious prosecution was dismissed by the Trial Court at the close of the plaintiff's case. (Transcript, page 36; Fols. 72-73). The defendant's motion to dismiss the cause of action for false arrest was denied by the Trial Court (Transcript, page 30; Fols. 72-73) and a motion to dismiss the plaintiff's complaint at the close of the entire case was also denied. (Transcript, pages 80-81; Fols. 156-158). While it is true that the complaint charged the filing of an information upon which the plaintiff, Kastenbaum, was arrested and taken into custody, (Transcript, pages 3-4; Fols. 6-9), the undis-

puted evidence was that no warrant had been issued at the time the respondent was taken into custody. (Transcript, page 22; Fols. 45-46; pages 74-75; Fols. 145-146).

It is not claimed by the Petitioner that a warrant had been issued at the time the arrest was made. The action was treated by the Trial Court and by counsel for both parties as an action for false arrest.

The charge of grand larceny, third degree, was laid against the respondent on the ground that he had stolen and taken away a quantity of butter valued at \$1,000, contained in a freight car of the Lehigh Valley Railroad, and it was the claim that the property had been appropriated to the use of the respondent. (Transcript, pages 10-11; Fols. 21-22).

The Director General of Railroads contended in the lower courts *inter alia* that his agent was justified in making the arrest in that the agent had probable cause to believe that the respondent had committed the crime. This court is, of course, precluded from examining any question of fact which was before the lower courts, upon this point. The only question before this court upon the issuance of this writ is whether an action of this character is maintainable against the Director General of Railroads. The petitioner contends that no such cause of action lies.

POINT 1.

The Courts of the State of New York erroneously held that an action for false arrest would lie against the Director General of Railroads, an officer of the United States; such a cause of action is not included within the provisions of Section 10 of the Act providing for the Federal control of carriers.

(a). *It is well settled that a cause of action for a tort may not be enforced against the sovereign government unless express consent to a suit to bring such a cause of action has been given by the sovereign government.*

This rule is too well settled to require extended argument or citation of authority. In the leading case of *Bigby vs. U. S.* (188. U. S. 400) this court said, at page 406:

"In *Robertson v. Sichel*, 127 U. S. 507, 515, the court said: 'The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.' So in *German Bank of Memphis v. United States*, 148 U. S.

573, 579: 'It is a well-settled rule of law that the Government is not liable for the non-feasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress.' * * * *

"It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887."

See also *Belknap vs. Schild*, 161 U. S. 10; *Langford vs. U. S.*, 101 U. S. 341; *Keokuk vs. Hamilton Bridge Company of U. S.*, U. S. Adv. Sheets, December 1, 1922, page 35, *in re Nabors*, 280 Fed. Rep. 943.

Specifically applying this rule to suits involving the Director General of Railroads, Judge Westenhaver, in the case of *Sandoval vs. Davis*, 278 Fed. Rep. 968, said, at page 971:

"(2) It is now also settled law that during federal control the operation of railways by the Director General was in substance and effect operation by the United States; that an action against the Director General to recover for injuries due to negligent operation is an action against the United States; and that

a liability arises and an action can be maintained only if created and consent by the United States to be sued is given by some specific provision of law."

(b). *The Federal Control Act did not express the consent of the government to a suit for false arrest.*

Section 10 of the Federal Control Act reads as follows:

"That carriers while under Federal control shall be subject to all loss and liabilities *as common carriers*, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President."

It is the contention of the petitioner that the words "*liabilities as common carriers*" were not intended to cover actions of such a nature as actions for false arrest. We believe that it is apparent that it was intended that such words were designed to cover only actions for negligence, breach of contract or the like; but that it never was intended to include an action for a tort, which implies necessarily an element of moral wrong and turpitude upon the part of the government's representative.

The complaint in this case alleged two causes of action: One for malicious prosecution and one for false arrest. It is true that at the close of the plaintiff's case the cause of action for malicious prosecution was dismissed. (Transcript, page 36, Fols. 72-74). The trial court, however, submitted the cause of action for false arrest to the jury, (Transcript, pages 80-81, Fols. 156-158) notwithstanding the motion made by counsel for defendant at the close of the plaintiff's case and at the close of the whole case for a dismissal.

It is important that this court should understand thoroughly the elements and nature of an action for false arrest under the law as interpreted by the decisions of the courts of the State of New York.

The leading case upon the subject is that of *Schultz vs. Greenwood Cemetery*, 190 N. Y. 276, where the Court of Appeals said, in its opinion, at page 278:

"An action against an officer for a false and illegal arrest and detention, known as an action for false imprisonment, may be justified by proof that a crime was committed and that he had reasonable ground to suspect that the person arrested was the offender; the arrest being made in good faith and without evil design. *The action is in the nature of a trespass for a direct wrong or illegal act, in which the officer and defendant must have*

personally participated by direct act or indirect procurement. The gist of the action is an unlawful detention, the burden of proof to establish probable cause for the arrest, or reasonable ground for suspicion, is upon the defendant. (Burns v. Erben, 40 N. Y. 463).

"An action for malicious prosecution against an officer or other person may be defended by proof of reasonable and probable cause for the prosecution and the burden of proving want of probable cause is upon the plaintiff. The plaintiff must allege and prove, not only the want of probable cause for the prosecution, but also that it was inspired by malice. (Besson v. Southard, 10 N. Y. 236; Heyne v. Blair, 62 N. Y. 19; Thaule v. Krekeler, 81 N. Y. 428; Anderson v. How, 116 N. Y. 336; Willard v. Holmes, Booth & Haydens, 142 N. Y. 492). In either case the action is defended whenever the facts and circumstances stated have been established, though it may turn out that the person arrested or prosecuted was innocent. It is not necessary for the defendant in this class of actions to establish that the person arrested was actually guilty. As this court has stated, innocent parties may sometimes be subjected to inconvenience and mortification; but any more lax rule would be greatly dangerous to the peace of the community and make the escape of criminals frequent and easy. (Burns v. Erben, *supra*, p. 470.") (Italics are ours).

It will be noted that an adequate defense to the claim is that the defendant had probable cause for the arrest or reasonable ground for suspicion of the guilt of the plaintiff. While the burden

of proving such probable cause or reasonable ground for suspicion is upon the defendant, nevertheless, if these elements are proved by the defendant, an adequate defense is established.

We respectfully submit that in an action against the sovereign government it must be conclusively presumed that good faith existed upon its part; that this necessarily requires probable cause for an arrest or reasonable ground for suspicion; that it will not be presumed that the defendant recklessly, and without probable cause, procured the arrest of innocent persons, but that the contrary must necessarily be presumed. We submit that the good faith of the sovereign is an irrefutable presumption and neither malice nor lack of good faith may be presumed against it.

In the case of *Pearl Dougherty v. Payne as Director General of Railroads*, decided by the United States District Court in the Southern District of Florida, 276 Fed. 451, the opinion of Judge Call reads as follows:

"This cause comes on for hearing upon the motion for leave to file an amended declaration.

"Heretofore on May 27th, inst., a demurrer was sustained to the declaration.

"The 5th ground of the demurrer raised the question whether an action for malicious prosecution could be brought against the Director General of Railroads, as such officer,

for the actions of one of the employees of a railroad system under his control. A careful study of the Acts of Congress covering the Governmental control of transportation system seems to me to answer this question in the negative. Such being my view no purpose would be served in granting the motion to amend and it will therefore be denied."

This decision was handed down June 9, 1921, and, as we are informed, the action was brought for the malicious prosecution of a linen counter employed by the Pullman Car Lines at Jacksonville, Fla., her arrest was procured at the instance of employees of the Pullman lines. She was acquitted by a jury and brought suit for malicious prosecution.

In the case of *Hines vs. Bowling*, 272 Fed. Rep. 230, suit was instituted to recover for damages for malicious prosecution. The question involved in this case was referred to by Judge Boyd in his opinion, but was not passed upon. Judge Boyd stated:

"The question which arises is whether or not, under such circumstances, malice or wrongful motive can be imputed to the Chief Executive, who was performing an official function, or to the Director General, his *alter ego*, and made the ground of damages at the instance of an individual in a suit against the latter. However, this proposition was not relied upon, nor argued by defendant's counsel, and we do not deem it necessary to pass upon it in order to dispose of the case."

In *State vs. Hines, Agent*, 228 S. W. Rep. 667, the Court of Civil Appeals of Texas held that an action for penalties did not lie against the Director General of Railroads for failure to keep well lighted the water-closets and adjacent depot grounds maintained at several passenger stations of a railroad taken over by the Director General of Railroads. The statutes of the State of Texas imposed a penalty for failure to keep these places lighted.

In *Missouri Pacific R. R. Co. vs. Ault*, 256 U. S. 554, both the railroad corporation and the Director General of Railroads were sued for a penalty under a statute of the State of Arkansas for non-payment of the wages of an employee within a certain period of days after his discharge. The judgment against the corporation was dismissed upon the ground that after the assumption of Federal control of the carrier the railroad corporation could not be held responsible for any acts of the employees of the road. In considering the question of the liability of the Director-General, the Supreme Court, in its opinion at page 557, said:

"The contention that the Director General being the carrier, is liable for the penalty imposed by the Arkansas statute, is rested specifically upon the clause in Sec. 10, to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers

whether arising under State or Federal laws or at common law' and the provisions of Sec. 15 that the 'lawful police regulations of the several states' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, *arising out of the operation of the railroad*, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed."

(Italics are ours).

We think that it appears from the authorities cited hereinabove that it was not the intention of Congress, at the time that the Federal Control Act was enacted, to authorize actions of a nature such as false arrest against that official of the United States Government representing it. It cannot be thought that the Sovereign Government would consent to be sued in a class of cases such as actions for malicious prosecution or false arrest, where there was an element of moral wrong upon its part.

False arrest or false imprisonment, has been defined as follows in *Addison on Torts*, p. 552:

"False imprisonment has been well defined to be a trespass committed by one man

against the person of another by *unlawfully* arresting him and detaining him without any legal authority."

In *New York P. & N. R. Co. vs. Waldron*, 82 Atl. 709, the action was defined as follows:

"‘False imprisonment’ is a wrong akin to that of assault and battery, and consists of imposing, by force or threats, unlawful restraint on a person’s freedom of locomotion. It is the unlawful detention of a person against his will.”

It is a universal principle that unless it is apparent from statute that a liability is intended to be imposed upon the government, such liability will not be held to exist by implication nor upon general principles. In the very recent case of *Pine Hill Co. v. United States*, decided May 29, 1922, reported in U. S. Advance Sheets, page 584, Mr. Justice Holmes said:

“A liability in any case is not to be imposed upon a government without clear words.”

We respectfully submit that within the authority of the cases hereinabove set forth it will not be presumed that the Government of the United States consented, by the Federal Control Act, to be sued in actions embracing an element of wrong or illegality upon the part of the sovereign.

POINT II.

The plaintiff's complaint herein should be dismissed with costs and judgment directed for the defendant.

.Respectfully submitted,

LYMAN M. BASS,
Attorney for Petitioner,
Office and Post Office Address,
1330 Marine Trust Bldg.,
237 Main Street,
Buffalo, N. Y.

THOMAS R. WHEELER,
LYMAN M. BASS,
Of Counsel.

FILED

MAR 9 1923

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1922.

No.  39

DIRECTOR GENERAL OF RAILROADS,
Petitioner.

against

SAMUEL KASTENBAUM,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of New York

BRIEF FOR RESPONDENT

ISRAEL G. HOLENDER,
Attorney for Respondent
Buffalo, N. Y.



IN THE
Supreme Court of the United States

OCTOBER TERM, A. D., 1922.

DIRECTOR GENERAL OF
RAILROADS,
Petitioner.
against
SAMUEL KASTENBAUM,
Respondent. } No. 374

**On Writ of Certiorari to the Supreme Court
of the State of New York**

BRIEF FOR RESPONDENT

POINT I

A false arrest action is clearly within the purview of the provisions of Section 10 of the Federal Act.

General Order 50, issued by the Director General of Railroads, October 28, 1918, provided, in part, as follows:

"It is therefore ordered that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or *injury to person*, or for loss and damage to property, arising since December 31, 1917, and

growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for Federal Control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, *that this order shall not apply to actions, suits or proceeding for the recovery of fines, penalties, and forfeitures.*"

The provisions of the foregoing order specifically allow an action to be brought against the Director General for "injury to person."

The Code of Civil Procedure of the State of New York (Section 3343, s-d. 9) provides as follows:

"'A personal injury' includes * * * an assault, battery, *false imprisonment* * * *"

In Missouri Pacific R. R. Co., vs. Ault, 256 U. S. 554, the court says, in part:

"The government undertook, as carrier, to observe all existing laws; it undertook to compensate any person injured through a departure of its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to permit any other sovereignty to punish it. * * *

"The purpose for which the government permitted itself to be sued was for compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier, while under Federal Control."

Fiero on Torts, under the head of "Compensatory Damages," states:

"Indemnity may be given for injury to reputation, feelings, health, mind, and person, caused by the arrest, together with the expenses of the defense."

The verdict in this case was rendered to compensate respondent for the loss of time, legal expenses, etc., occasioned by his unwarranted arrest.

POINT II

Section 10 of the Federal Control Act provides that No Defense shall be made upon the ground that the carrier is an instrumentality or agency of the Federal Government. It was not intended by this legislation either to extinguish or impair vested rights of action or to authorize the President or his agents so to do.

Respondent was arrested January 23, 1918.

The false arrest action was instituted on August 17, 1918.

The "Lehigh Valley Railroad Company" was named as defendant.

An answer was interposed on behalf of the company, which alleged, in part, as follows:

"That heretofore the said Director General of Railroads issued a general order known as Order No. 50, which was dated October 28, 1918, and which provided, among other things, that actions at law arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads should be brought against William G. McAdoo, Director General of Railroads, and not otherwise; and further providing that pleadings in all actions of law pending at the time said order was issued against any carrier company for a cause of action arising since December 31, 1917, based on a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the said Director General of Railroads for the carrier company as party defendant, and dismissing the company therefrom, to all the provisions of which said order No. 50 reference hereby is made as though set forth in full.

"That thereafter said order No. 50 was amended by general order No. 50-A, which

said order contained the same provisions as order 50 hereinabove referred to, but directed that hereafter actions of the character hereinabove referred to should be brought against "Director General of Railroads" and not otherwise, reference to said order No. 50-A being hereby made as though herein set in full."

Respondent, thereafter, served an amended complaint, substituting the "Director General of Railroads," as defendant, in place and stead of the "Lehigh Valley Railroad Company."

An answer to the amended complaint was then interposed, on behalf of the Director General, which is in the form of a general denial with the exception of certain admitted facts.

Act of March 21, 1918 (Federal Control Act) Chapter 25, Sec. 10, reads, in part, as follows:

"Carriers while under Federal Control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

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In *Moore & Co. v. A. T. & S. F. R. Co.*, 106 Misc 59, the head note, reads in part, as follows:

"The provision of section 10 of said act of Congress, which declares that 'Carriers while under Federal control shall be subject to all laws and liabilities as common carriers * * * except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President', must be construed to be wholly prospective in its operation and to affect only liabilities arising after said act took effect; it was not intended by this legislation either to extinguish or impair vested rights of action or to authorize the President or his agent or agents so to do."

POINT III

The order and judgment of the Supreme Court of the State of New York should be affirmed with costs.

Respectfully submitted,

ISRAEL G. HOLENDER,
Attorney for Respondent,
Office and P. O. Address,
738 Prudential Bldg.,
Buffalo, N. Y.

Service of a copy of the within memorandum is acknowledged this day of April, 1922.

Attorney for Petitioner.

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DIRECTOR GENERAL OF RAILROADS v. KASTEN-
BAUM.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF
NEW YORK.

No. 39. Argued October 3, 4, 1923.—Decided November 12, 1923.

Under § 10 of the Federal Control Act, an action for false imprisonment may be maintained against the Director General of Railroads by a person, who, at the instigation of railroad detectives, (agents of the Director General,) acting without probable cause, was arrested without warrant for a theft of freight from the railroad while under federal control. P. 27.
198 App. Div. 966; 199 id. 957, affirmed.

CERTIORARI to the Supreme Court of New York to review a judgment for damages recovered by the respondent from the petitioner in an action for false imprisonment. The judgment was affirmed by the Appellate Division and leave to appeal to the Court of Appeals was denied.

Mr. Thomas R. Wheeler, with whom *Mr. Lyman M. Bass* was on the brief, for petitioner.

Mr. Israel G. Holender for respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Respondent brought an action in the Supreme Court of Erie County, New York, against the Director General of Railroads, seeking damages for false imprisonment and malicious prosecution. The trial court, at the close of the plaintiff's case, dismissed the cause of action for malicious prosecution, but allowed the trial to proceed to verdict and judgment for \$500 for false imprisonment. The judgment was affirmed by the Appellate Division of the Supreme Court and a motion for leave to appeal was denied by the Court of Appeals of the State.

The brief for petitioner on the merits states the single question to be:

Does an action for false arrest lie against the petitioner, an officer of the United States Government, under the provisions of § 10 of the Act of Congress of March 21, 1918, c. 25, 40 Stat. 451, providing for federal control of carriers?

Twenty-one tubs of butter were taken from a freight car of the Lehigh Valley Railroad in Buffalo. A trolley car of that city, late at night, collided with a horse and wagon and, in the wreck which followed, the stolen tubs of butter were discovered. Two men who had been driving the wagon escaped. The detective force of the railway company sought to discover the owner of the horse and thought they had traced the ownership to Kastenbaum, who was a huckster. The railroad detective notified the police authorities of the city, who detailed two policemen to accompany him to Kastenbaum's house, where they arrested him without warrant. They took him to a police station and kept him there over night and until he was released the next day on bail. He was brought to a hearing before an examining magistrate on a charge of grand larceny and burglary. After four or five adjournments, at the instance of the prosecution, the magistrate discharged Kastenbaum. His horse proved to be one of another color. Under the charge of the court

the jury were permitted to return only compensatory damages.

Section 10 of the Federal Control Act provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

By General Order No. 50, the Executive so limited suits to be brought against carriers for injuries to person or property under the section as to exclude those for recovery of fines, penalties and forfeitures.

As we said in *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, 563:

"The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it."

The action for false imprisonment is in the nature of a trespass for a wrong or illegal act in which the defendant must have personally participated directly or by indirect procurement. The gist of it is an unlawful detention, and that being shown the burden is on the defendant to establish probable cause for the arrest. The want of probable cause, certainly in the absence of proof of guilt or conviction of the plaintiff, is measured by the state of

the defendant's knowledge, not by his intent. It means the absence of probable cause known to the defendant when he instituted the suit. But the standard applied to defendant's consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did. Holmes on the Common Law, 140. Probable cause is a mixed question of law and fact. The court submits the evidence of it to the jury, with instructions as to what facts will amount to probable cause if proved. *Stewart v. Sonneborn*, 98 U. S. 187, 194; Pollock on Torts, 8th ed., p. 225; Cooley on Torts, 3d ed., Vol. 1, p. 321. Counsel for petitioner contends that, in an action against the sovereign government, it must be conclusively presumed that good faith existed upon its part so far as it is responsible for the arrest, and therefore that a complete defense of probable cause on its part is always made out. But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable.

The Government under § 10, in a case of false imprisonment, stands exactly as if it were a railway corporation operating as a common carrier. Such a corporation would clearly be responsible for an arrest of the kind here shown, if without probable cause and made by one of its detectives employed to protect the property entrusted to its care as a common carrier. It is within the scope of the agency of such an employee to discover the perpetrators of crime against the property in order to recover it and to procure the arrest of supposed offenders and their prosecution and conviction in order to deter others from further depredations. If, in the field of such employment, the agent acts without probable cause and an illegal arrest without judicial warrant is made, the corporation

is liable as for any other act of its agents within the scope of their employment in carrying on the business of a common carrier. *Philadelphia, Wilmington & Baltimore R. R. Co. v. Quigley*, 21 How. 202, 210; *Genga v. Director General of Railroads*, 243 Mass. 101.

We have not before us the question whether the Director General might be held for exemplary damages in a case like this, under the restrictions of Order No. 50, as construed in the *Ault Case*, because, as already said, the court limited the recovery to compensatory damages.

Affirmed.

DENBY, SECRETARY OF THE NAVY, ET AL., PETITIONERS.